SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~657~~ 20

CARNATION COMPANY, PETITIONER,

vs.

PACIFIC WESTBOUND CONFERENCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., APRIL 30, 1965

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

[fol. 2]

41153

DATE			FILINGS—PROCEEDINGS
1962			
Dec	5	1	Filed complaint, issued summons
	6	2	Filed order appointing W. J. Kelley of San Francisco, Calif. for the purpose of serving summons in this action (Weigel)
	21	3	Filed summons, executed as to American Mail Line, Ltd., Daido Kaiun Kaisha, Ltd., The East Asiatic Company, Ltd., Nippon Yusen Kaisha, a/k/a N.Y.K. Line, Pacific Westbound Conference, States Steamship Co., United States Lines Co. Dec. 6, 1962; American President Lines, Ltd., Far East Conference, Fern-Ville Far East Lines—Fearnley & Eger, A. F. Klaveness & Co. A/S, Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteressentskabet Garonne, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, Aktieselskabet Standard, Fearnley & Egers Befragtningsforretning A/S, IINO Kaiun Kaisha, Ltd., Java Pacific & Hoegh Lines—Joint Service, N. V. Stoomvaart Maatschappij "Nederland", Koninklijke Rotterdamsche Lloyd, N. V., Skibsaktieselskapet Arizona, Skibsaktieselskapet Astrea, Skibsaktieselskapet Aruba, Skibsaktieselskapet Nor-

DATE		FILINGS—PROCEEDINGS
1962		
Dec 21 (Cont)	3	euga, Skibsaktieselskapet Abaco, A/S Atlantica, Kawasaki Kisen Kaisha, Ltd., Klaveness Line-Joint Service, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskapet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, Knutsen Line-Joint Service, Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth, Skibsaktieselskapet Ogeka, Hvalfangstaktieselskapet Suderoy, Lykens Bros. S.S. Co. Inc., A. P. Moller-Maersk Line-Joint service, Dampskibsselskabet AF 1912, Aktieselskabet Dampskibsselskabet Svendborg, Nitto Shosen Co. Ltd., Pacific Far East Line, Inc., Pacific Transport Lines, Inc., Shinnihon Steamship Co., Ltd., Transocean Transport Corp. (sometimes d/b/a Magsaysay Lines), United Philippine Lines, Inc., and Yamashita Kisen Kaisha December 7, 1962; as to Isthmian Lines, Inc.; Mitsubishi Kaiun Kaisha, Ltd., Mitsubishi Shipping Co. Ltd., Kokusai Line-Joint service, Mitsui Steamship Co., Ltd., Nippon Kisen Kaisha, Ltd. (sometimes d/b/a Nissan Pacific Line), Nissan Kaisen Kaisha, Ltd., Osaka Shosen Kaisha, Ltd., Prince Line Ltd., States Marine Corp., States Marine Corp. of Delaware, States Marine Lines, Inc. (a/k/a Global Bulk Transport Corp.), Waterman Steamship Corp., Wilhelmsens Dampskibsak-

DATE FILINGS—PROCEEDINGS

1962

Dec 21 (Cont) 3 tieselskab, A/S Den Norski Afrika-Og [fol. 3] Australieline, A/S Tonsberg, A/S Tankfarti I. A/S Tankfart IV, A/S Tankfart V, A/S Tankfart VI, December 10, 1962; as to Maritime Co. of the Philippines, Inc., Orient Mid-East Lines, Pacific Orient Express Line-Joint Service, Skipsaktiesselskapet Nordheim, Skipsaktieselskapet Vito, Skipsaktieselskapet Kirkoy, Skipsaktieselskapet Skagerek (Ditley-Simonsen Lines), Transatlantic Steamship Co. Ltd. of Gotbenburg and Philippine National Lines December 11, 1962; as to Canadian Pacific Ry. Co., De La Rama Lines-Joint Service, The De La Rama Steamship Co. Inc., The Swedish East Asia Co. Ltd., The Ocean Steamship Co. Ltd., The China Mutual Steam Navigation Co. Ltd., Nederlandschij Stoomvaart Maatschappij "Oceaan" N. V., Ellerman & Bucknall Associated Lines—joint service, Ellerman Lines, Ltd., Ellerman & Bucknall Steamship Co. Ltd., The City Line Ltd. Hall Line, Ivaran Lines-Far East Service-Joint service, Skibsaktieselskapet Igadi, Aktieselskapet Ivarans Rederi, A/S Besco, A/S Lise, Orient Steam Navigation Co. Ltd., and P & O Orient Lines December 12, 1962; and Unserved as to The Bank Line, Compagnie De Transports Oceaniques, Compagnie Maritime Des Chargeurs Reunis, James A. Dennean, W. C. Galloway, Kokusai Kain Kaisha, Ltd. and Toho Kaiun Kaisha, Ltd.

DATE			FILINGS—PROCEEDINGS
1962			
Dec	26	4	Filed stip. & Order ext. time for Deft. Pacific Westbound Conference, W. C. Galloway and member carriers, to plead, to Feb. 1, 1963. (Carter)
	26	5	Filed stip. & order ext. time for Deft. Far East Conference and member Carriers to plead, to Feb. 1, 1963. (Carter)
1963			
Jan	4	6	Filed stip. & order ext. time for deft. Canadian Pacific Ry. Co. to plead, to Feb. 1, 1963. (Carter)
	31	7	Filed stip. & order ext. time for Pacific Westbound Conference, W. C. Galloway, Canadian Pac. Ry. and member carriers, to plead, to March 1, 1963. (Carter)
	31	8	Filed stip. & order ext. time for Far East Conference and member carriers to plead, to March 1, 1963. (Carter)
Mar	1	9	Filed stip. & order ext. time for Deft. Canadian Pacific Ry. and East Asiatic Co. to plead, to Mar. 8, 1963. (Harris)
	1	10	Filed stip. & order ext. time for Deft. Nissan Kaisen Kaisha, Toho Kaium Kaisha, Lino Kaiun Kaisha, Mitsubishi Kaiun Kaisha, Kokusai Kaium Kaisha to plead, to Mar. 8, 1963.
	1	11	Filed notice & Motion by Far East Conference to dismiss, Mar. 11, 1963, 10:00 A. M. with supporting memo and copy of proposed order.

[fol. 4]

DATE			FILINGS—PROCEEDINGS
1963			
Mar	1	12	Filed notice & Motion by Pacific Westbound Conference, W. C. Galloway to dismiss, Mar. 11, 1963, 10:00 A.M. with copy of proposed order, and supporting memo.
	1	13	Filed notice & Motion by Federal Maritime Commission to intervene, Mar. 11, 1963, 10:00 A.M. with proposed order attached.
	1	14	Filed memo by Fed. Maritime Comm. supporting mo to intervene.
	1		Lodged proposed answer of Fed. Maritime Comm.
	1	15	Filed notice & Motion by Federal Maritime Commission to dismiss, Mar. 11, 1963, 10:00 A.M. with copy of proposed order attached.
	1	16	Filed memo by Fed. Maritime Comm. supporting mo to dismiss.
	1	17	Filed receipt of service by parties of copies of mos. Mar. 1, 1963.
	5	18	Filed stip. & order ext. time for Carnation Co. to file memo in opposition to motions to dismiss to Mar. 21, 1963; defts. & deft-intervener to reply by Apr. 3, 1963 and hrg. calendared on Apr. 8, 1963. (Weigel)
	5	19	Filed stip. & order ext. time for Carnation Co. to file memo on mo to intervene; interner to reply by Apr. 3, 1963 and hrg. calendared Apr. 8, 1963. Fur. Stip. & order if time for hrg. on mo to dismiss is

DATE			FILINGS—PROCEEDINGS
1963			
Mar (Cont)	5	19	extended, the time for hrg. on mo to intervene will also be ext. to same date. (Weigel)
	5	20	Filed stip. & order of dismissal without prejudice as to defts. Canadian Pacific Railway Company and The East Asiatic Co. Ltd. (Weigel)
	12	21	Filed stip. & order that stip. ext. time to Mar. 8, 1963 for defts. Nissan Kaisen Kaisha, Ltd., Toho Kaium Kaisha, Ltd. Iino Kaiun Kaish, Ltd. Mitubishi Kaium Kaisha, Ltd., Lokusai Kaiun Kaisha Ltd. d/b/a Kokusai Line-Joint Service to plead, was not intended to and is not applicable to any party other than Kokusai Line-Joint Service. (Harris)
	12	22	Filed stip. & order dismissing without prejudice the deft. Kokusai Line-Joint Service. (Harris)
	21	23	Filed memo by Pltff. opposing motions to dismiss.
	21	24	Filed memo by Pltff. objecting to mo of Federal Maritime Commission for leave to intervene as deft.
Apr	3	25	Filed reply brief of defts. Pacific Westbound Conference, et al.
	3	26	Filed reply memo of defts. Far East Conference, et al.
	3	27	Filed reply memo by Fed. Maritime Commission supporting mo to dismiss as to Pacific Westbound Conf.

DATE			FILINGS—PROCEEDINGS
1963			
Apr	3	28	Filed reply memo by Fed. Maritime Commission supporting mo to dismiss as to Far East Conf.
[fol. 5] Apr	8		Ord after hearing, motion to dismiss and motion of Fed. Maritime Commission to intervene is *submitted.* (Sweigert)
	30	29	Filed order granting mo of Federal Maritime Commission to intervene. Counsel to arrange a hearing time with the Clerk for further argument, if not possible the Court will fix a time. (Copies mailed) (Sweigert)
	30	29-A	Filed answer of Fed. Maritime Commission, intervener
May	27	30	Filed memo of Fed. Maritime Commission, Deft.-Intervener on further argument.
Jun	5	31	Filed suppl. memo by deft. Pacific Westbound Conf. et al. on question raised by Court.
	5	32	Filed memo by deft. Far East Conf. supporting mo to dismiss.
	5	33	Filed memo by Pltff. on further argument of mo to dismiss.
	11		Ord. aft hrg, mo to dismiss stand submitted. (Sweigert)
	21	34	Filed memorandum of opinion. (Motions to dismiss are granted; moving parties to present orders.) (Copies mailed) (Sweigert)
	27	35	Entered order granting mos to dismiss and Judgment of dismissal, filed June 26, 1963, dismissing action. (Harris)

DATE			FILINGS—PROCEEDINGS
1963			
Jul	18	36	Filed notice of appeal by plaintiff.
	18	37	Filed appeal bond, sum of $250.00 by pltff.
	18	38	Filed designation of record on appeal and statement of points to be relied upon on appeal.
	19		Mailed notice of notice of appeal to counsel of record.
	29	39	Filed designation by defts. of additional portions of record on appeal.
Aug	16	40	Filed Reporter's. Trans. mo to dismiss & mo of Fed. Maritime Commiss. for leave to intervene as deft., Apr. 8, 1963.
	22	41	Filed stip. & order for withdrawal of records for duplication. (Weigel)
	22	42	Filed Reporter's. Trans. Fur hrg. on mo to dismiss, Jun. 11, 1963.
	26	43	Filed order ext. time to file record & docket appeal, to Wednesday, Sept. 25, 1963. (Sweigert)

[fol. 6] [File endorsement omitted]

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Dunne & Phelps, 333 Montgomery Street, San Francisco 4, California, Telephone: YUkon 6-4812; Attorneys for Plaintiff, Carnation Company.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil Action File No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE and unincorporated association; the following corporations, individually and as members of said associations (as hereinafter ap-[fol. 7] pears): N. V. STOOMVAART MAATSCHAPPIJ "NEDER LAND", KONINKLIJKE ROTTERDAMSCHE LLOYD N. V., SKIBSAKTIESELSKAPET ARIZONA, SKIBSAKTIESELSKAPET ASTREA, SKIBSAKTIESELSKAPET ARUBA, SKIBSAKTIESELSKAPET NORUEGA, SKIBSAKTIESELSKAPET ABACO, A/S ATLANTICA, doing business as JAVA PACIFIC & HOEGH LINES—JOINT SERVICE; SKIBSAKTIESELSKAPET SANGSTAD, SKIBSAKTIESELSKAPET SOLSTAD, SKIBSAKTIESELSKAPET SILJESTAD, DAMPSKIBSAKIESELSKAPET INTERNATIONAL, SKIBSAKTIESELSKAPET MANDEVILLE, SKIBSAKTIESELSKAPET GOODWILL, doing business as KLAVENESS LINE—JOINT SERVICE; DAMPSKIBSAKTIESELSKAPET JEANETTE SKINNER, SKIBSAKTIESELSKAPET PACIFIC, SKIBSAKTIESELSKAPET MARIE BAKKE, DAMPSKIBSAKTIESELSKAPET GOLDEN GATE, DAMPSKIBSAKTIESELSKAPET LISBETH, SKIBSAKTIESELSKAPET OGEKA, HVALFANGSTAKTIESELSKAPET SUDEROY, doing business as KNUTSEN LINE—JOINT SERVICE; SKIPSAKTIESEL-

skapet Nordheim, Skipsaktieselskapet Vito, Skipsaktieselskapet Kirkoy, Skipsaktieselskapet Skagerek (Ditley-Simonsen Lines), Transatlantic Steamship Company, Ltd., of Gotbenburg, doing business as Pacific Orient Express Line—Joint Service; American Mail Line, Ltd.; Mitsubishi Shipping Co., Ltd., Nippon Kisen Kaisha, Ltd. (sometimes doing business as and known as Nissan Pacific Line); Nitto Shosen Co., Ltd.; Pacific Far East Line, Inc.; Pacific Transport Lines, Inc.; States Steamship Company; Transocean Transport Corp. (sometimes doing business as Magsaysay Lines); Canadian Pacific Railway Company; The East Asiatic Company, Ltd.; Compagnie Maritime Des Chargeurs Reunis; Orient Steam Navigation Co., Ltd.; P & O—Orient Lines; Ellerman Lines, Limited, Ellerman & Bucknall Steamship Co. Limited, The City Line, Limited, Hall Line, doing business as Ellerman & Bucknall Associated Lines—Joint Service; Nissan Kaisen Kaisha, Ltd., Toho Kaiun Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Mitsubishi Kaiun Kaisha, Ltd., Kokusai Kaiun Kaisha, Ltd., doing business as Kokusai Line—Joint Service; The Bank Line; Lykes Bros. S. S. Co., Inc.; Mitsubishi Kaiun Kaisha, Ltd.; Orient Mid-East Lines; Prince Line Ltd.; United States Lines Company; The De La Rama Steamship Co., Inc., The Swedish East Asia Co., Ltd., The Ocean Steamship Co., Ltd., The China Mutual Steam Navigation Company, Ltd., Nederlandschi Stoomvaart Maatschappij "Oceaan" N. V., doing business as De La Rama Lines—Joint Service; Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteressentskabet Garonne; Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsak-[fol. 8] tieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, Aktieselskabet Standard, Fearnley & Egers Befragtningsforretning A/S, doing business as Fern-Ville Far East Lines—Fearnley & Eger and A. F. Klaveness & Co. A/S; Skibsak-

tieselskapet Igadi, Aktieselskapet Ivarans Rederi, A/S Besco and A/S Lise, doing business as Ivaran Lines—Far East Service—Joint Service; Dampskibsselskabet AF 1912, Aktieselskab, Aktieselskabet Dampskibsselskabet Svendborg, doing business as A. P. Moller-Maersk Line—Joint Service; A/S Den Norski Afrika-Og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, A/S Tankfart VI, doing business as Wilhelmsens Dampskibsaktieselskab; American President Lines, Ltd.; Compagnie De Transports Oceaniques; Daido Kaiun Kaisha, Ltd.; Isthmian Lines, Inc.; Kawasaki Kisen Kaisha, Ltd.; Iino Kaiun Kaisha, Ltd.; Maritime Company of the Philippines, Inc.; Mitsui Steamship Company, Ltd.; Nissan Kaisen Kaisha, Ltd.; Nippon Yusen Kaisha (also known as N. Y. K. Line); Osaka Shosen Kaisha, Ltd.; Pacific Transport Lines, Inc.; Philippine National Lines; Shinnihon Steamship Co., Ltd.; States Marine Lines, Inc. (also known as Global Bulk Transport Corporation); States Marine Corporation; States Marine Corporation of Delaware; United Philippine Lines, Inc.; Waterman Steamship Corporation and Yamashita Kisen Kaisha; and also W. C. Galloway and James A. Dennean, Defendants.

Complaint—Filed December 5, 1962

Complaint for Damages and Other Relief on Account of Violation of the Antitrust Laws of the United States

Comes now Carnation Company, a corporation, and complaining of the defendants brings this civil action against defendants based upon defendants' violation of the antitrust laws of the United States and for treble the amount of [fol. 9] damages suffered by it by reason of defendants' violations of the antitrust laws of the United States, and in this behalf shows as follows:

1. This action is brought for treble damages and arises under the Act of Congress of July 2, 1890, c. 647, 27 Stat. 209 as amended (15 USC §§ 1-7, commonly known as the Sherman Antitrust Act), and the Act of Congress of October 15, 1914, c. 323, 38 Stat. 730, as amended (15 USC §§ 12-27 commonly known as the Clayton Act). The jurisdiction of this Court is invoked under the provisions of said statutes and the laws of the United States in such cases made and provided.

2. This action is brought against the defendants above named and hereinafter identified. Statements herein in the present tense refer to, and are made as of, all times herein mentioned except when hereafter specific and particular times are stated.

3. Each of the defendants, except as hereinafter stated, maintains an office, transacts business, has an agent and/or is found within the above named District and Division.

4. The evaporated milk manufactured, sold and shipped by plaintiff, as hereinafter stated, regularly moves by common carrier by water from Pacific Coast ports of the United States to the Philippine Islands in commerce and trade with foreign nations. The defendants other than Pacific Westbound Conference, Far East Conference, Dennean and Galloway are herein sometimes referred to as the carrier defendants. The business of the carrier defendants is the business of providing transportation as carriers by water in commerce with foreign nations. The price fixing combination and conspiracy and the price fixing hereinafter averred was in respect of said business of said carrier defendants and operated directly in and on and restrained said business and on the transportation of evaporated milk manufactured, sold and shipped as aforesaid by plaintiff, and restrained commerce and trade with foreign nations.

[fol. 10] 5. Plaintiff, Carnation Company, is a Delaware corporation, licensed to do business and doing business in the State of California and in the above District and Division. It has its principal office in the State of California.

It is engaged in the business, among other things, of manufacturing and processing fluid milk into evaporated milk, packing said evaporated milk and selling and shipping it in trade and commerce with foreign nations. More particularly plaintiff so sells said evaporated milk to buyers in the Philippine Islands and so ships it from Pacific Coast ports of the United States to the Philippine Islands and to said buyers in the Philippine Islands by carriers by water and by carrier defendants who served said trade and who are members of the Pacific Westbound Conference. The evaporated milk shipped by plaintiff as hereinafter averred was so shipped and transported.

6. Defendants N. V. Stoomvaart Maatschappij "Nederland", Koninklijke Rotterdamsche Lloyd N. V., Skibsaktieselskapet Arizona, Skibsaktieselskapet Astrea, Skibsaktieselskapet Aruba, Skibsaktieselskapet Noruega, Skibsaktieselskapet Abaco and A/S Atlantica are corporations associated together in business and doing business under the name Java Pacific & Hoegh Lines—Joint Service. Defendants Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville and Skibsaktieselskapet Goodwill are corporations associated together in business and doing business under the name Klaveness Line—Joint Service. Defendants Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth, Skibsaktieselskapet Ogeka and Hvalfangstaktieselskapet Suderoy are corporations associated together in business and doing business under the name Knutsen Line—Joint Service. Defendants Skipsaktieselskapet Nordheim, Skipsaktieselskapet Vito, Skipsaktieselskapet Kirkoy, Skipsaktieselskapet [fol. 11] Skagerek (Ditley-Simonsen Lines) and Transatlantic Steamship Company, Ltd., of Gotbenburg are corporations associated together in business and doing business as Pacific Orient Express Line—Joint Service. Defendants American Mail Line, Ltd., Mitsubishi Shipping Co., Ltd.,

Nippon Kisen Kaisha, Ltd. (sometimes doing business as and known as Nissan Pacific Line), Nitto Shosen Co., Ltd., Pacific Far East Line, Inc., Pacific Transport Lines, Inc., States Steamship Company, Transocean Transport Corp. (sometimes doing business as Magsaysay Lines), Canadian Pacific Railway Company, The East Asiatic Company, Ltd., Compagnie Maritime des Chargeurs Reunis, Orient Steam Navigation Co., Ltd., and P. & O.—Orient Lines are corporations. In and after January 1953 said defendants were common carriers by water in foreign commerce and as such provided transportation by water in such commerce from the Pacific Coast ports of the United States to the Far East, and particularly Manila in the Philippine Islands, for various commodities including evaporated milk.

7. Defendants Ellerman Lines, Limited, Ellerman & Bucknall Steamship Co. Limited, The City Line, Limited, and Hall Line, Limited, are corporations associated together in business and doing business as Ellerman & Bucknall Associated Lines—Joint Service. Defendants Nissan Kaisen Kaisha, Ltd., Toho Kaiun Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Mitsubishi Kaiun Kaisha, Ltd., and Kokusai Kaiun Kaisha, Ltd., are corporations associated together in business and doing business as Kokusai Line—Joint Service. Defendants The Bank Line, Lykes Bros. S. S. Co., Inc., Mitsubishi Kaiun Kaisha, Ltd., Orient Mid-East Lines, Prince Line Ltd. and United States Lines Company are corporations. In and after January 1953 said defendants were carriers by water from Atlantic Coast and Gulf of Mexico ports of the United States to the Far East.

8. Defendants The De La Rama Steamship Co., Inc., The Swedish East Asia Co., Ltd., The Ocean Steamship Co., Ltd., The China Mutual Steam Navigation Company, Ltd., and Nederlandschi Stoomvaart Maatschappij [fol. 12] "Oceaan" N. V. are corporations associated together in business and doing business as De La Rama Lines —Joint Service. Defendants Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteressentskabet Garonne, Skibsaktieselskapet Sang-

stad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, Aktieselskabet Standard and Fearnley & Egers Befragtningsforretning A/S are corporations associated together in business and doing business as Fern-Ville Far East Lines—Fearnley & Eger and A. F. Klaveness & Co. A/S. Defendants Skibsaktieselskapet Igadi, Aktieselskapet Ivarans Rederi, A/S Besco and A/S Lise are corporations associated together in business and doing business as Ivaran Lines—Far East Service—Joint Service. Defendants Dampskibsselskabet Af 1912, Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg are corporations associated together in business and doing business as A. P. Moller-Maersk Line—Joint Service. Defendants A/S Den Norski Afrika-Og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI are corporations associated together in business and doing business as Wilhelmsens Dampskibsaktieselskab. Defendants American President Lines, Ltd., Compagnie De Transports Oceaniques, Daido Kaiun Kaisha, Ltd., Isthmian Lines, Inc., Kawasaki Kisen Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Maritime Company of the Philippines, Inc., Mitsui Steamship Company, Ltd., Nissan Kaisen Kaisha, Ltd., Nippon Yusen Kaisha (also known as N. Y. K. Line), Osaka Shosen Kaisha, Ltd., Pacific Transport Lines, Inc., Philippine National Lines, Shinnihon Steamship Co., Ltd., States Marine Lines, Inc. (also known as Global Bulk Transport Corporation), States Marine Corporation, States Marine Corporation of Delaware, United Philippine Lines, Inc., Waterman Steamship Corporation and Yamashita Kisen Kaisha are corporations. In and after January 1953 [fol. 13] said defendants were common carriers by water in foreign commerce and as such provided transportation by water in such commerce from the Atlantic Coast, Gulf of Mexico and Pacific Coast ports of the United States to the Far East, and particularly Manila in the Philippine Islands, for various commodities including evaporated milk.

9. Before January 1953 common carriers by water in foreign commerce, providing water transportation as such from Pacific Coast ports of the United States and of Canada to the Far East (including Manila in the Philippine Islands) and as such carriers serving the trade from said ports of the United States and Canada to the Far East, associated themselves together in a conference and under and pursuant to the terms of a written agreement known as Pacific Westbound Conference Agreement No. 57 formed the defendant voluntary association and conference, known as the Pacific Westbound Conference (hereafter referred to as PWC), for the purpose of acting as a group to regulate said commerce and the transportation service of said trade and particularly for the purpose of fixing, by tariffs by and through said association and conference, the rates at which the members of said association and conference would serve said trade by transportation of commodities in said trade and commerce. PWC is a conference only of carriers serving said trade. In and by said Agreement No. 57 it was provided that PWC should fix said rates and issue a tariff thereof. Said agreement was filed for approval with, and was approved by, the United States Shipping Board agreeably to the provisions of section 15 of the Shipping Act, 1916 and thereafter remained approved and in full force and effect. Only carriers serving said trade from Pacific Coast ports of the United States and of Canada to the Far East are members of PWC. Thereafter the rates of the members of defendant PWC for transportation of commodities in said trade and commerce and from the Pacific Coast ports of the United States to the Far East (Manila, Philippine Islands, included), including the rates applicable to [fol. 14] the transportation of evaporated milk, were fixed by PWC acting agreeably to and under said Agreement No. 57, except as hereinafter averred.

10. In and after January 1953 the carrier defendants named in paragraphs 6 and 8 were parties to said Agreement No. 57 and members of defendant PWC. None of the carrier defendants named in paragraph 6 above was or is a

member of defendant Far East Conference. In and after January 1953 defendant W. C. Galloway was Chairman of defendant PWC.

11. Since before January 1953 the members of defendant PWC were the only common carriers by water providing general cargo and regular berth service and transportation service on substantially regular routes and with regular sailings, from Pacific Coast ports of the United States to the Far East.

12. Since before January 1953 defendant PWC has maintained its headquarters and its office and has conducted its business at San Francisco, California. At no time was it a carrier or a common carrier or in the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with any common carrier by water. Its business was and is, among other things, that of investigating and accumulating data with respect to the business of transportation by water from Pacific Coast ports of the United States to the Far East, including rates to be charged for such service and of fixing rates for such service by its members.

13. Before January 1953 carriers by water providing transportation service from the Atlantic Coast and Gulf of Mexico ports of the United States to the Far East (including Manila in the Philippine Islands) and as such carriers serving the trade from said ports of the United States to the Far East, associated themselves together in a conference and formed the defendant voluntary association and conference known as Far East Conference (hereafter referred to as FEC) for the purpose, among other things, of fixing transportation rates for transportation in said trade by its members who served said trade. Only carriers serving said trade from the Atlantic Coast and Gulf of Mexico [fol. 15] ports of the United States to the Far East are members of said association and conference and FEC is a conference only of carriers serving said trade. In and after January 1953 the carrier defendants named in para-

graph 7 and 8 above were members of said association and conference, and none of the defendants named in paragraph 7 above was a member of defendant PWC. Defendant James A. Dennean is Chairman of defendant FEC.

14. At no time was defendant FEC a carrier or a common carrier or in the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with any common carrier by water. Its business was and is that, among other things, of acting for its members in connection with the fixing of rates for transportation of commodities, by carriers by water from Atlantic Coast and Gulf of Mexico ports of the United States to the Far East as herein stated and at no time was it lawfully authorized or empowered to fix any rates from Pacific Coast ports of the United States nor was it agreed that it should have any part in fixing said rates except as averred in paragraph 18 below.

15. The carrier defendants are sued herein individually and as members of the association or associations of which they were members as herein stated.

16. The business and trade in commodities from the Atlantic Coast and Gulf of Mexico ports of the United States to the Far East is naturally competitive with the business and trade in commodities from the Pacific Coast ports of the United States to the Far East and PWC and FEC are conferences of carriers serving said different trades that are naturally competitive and would in fact be competitive and the transportation services for said different trades would be competitive and is competitive except as restrained as herein stated.

17. In November 1952 defendants, who were members of PWC, and defendants, who were members of FEC, entered [fol. 16] into an agreement in writing, known as Agreement No. 8200, wherein and whereby it was provided that said defendant members of defendant PWC and of defendant FEC should meet and make rules for joint action by said defendants which should include "the provision of ma-

chinery for the change of any rates, rules and regulations", but wherein and whereby it was provided that defendant PWC retained the right of independent action in respect of rates and that if defendant PWC "should determine that conditions affecting its operations require" a "change in its tariffs" it might notify defendant FEC of such proposed change, specifying the change, and thereafter and after the expiration of a maximum time of 72 hours after such notice defendant PWC "may make such changes". In and by said Agreement No. 8200 it was further provided that said agreement should not apply to 12 named commodities when shipped in bulk, referred to as "excepted commodities". Evaporated milk was not specified as one of said "excepted commodities". Said Agreement No. 8200 was filed for approval by, and was approved by, the Federal Maritime Board.

18. The provisions of said Agreements No. 57 and No. 8200 notwithstanding and contrary thereto, in January 1953 defendants met at Santa Barbara, California, and then and there secretly and unlawfully associated themselves together and secretly and unlawfully combined, conspired and agreed to restrain commerce with foreign nations and to act and to fix rates for transportation of commodities, by the defendant carriers who were members of defendant PWC, from Pacific Coast ports of the United States to the Far East, not as provided in said Agreement No. 57 and not as provided in said Agreement No. 8200, and thereafter, said Agreements No. 57 and No. 8200 being still in effect, met and secretly and unlawfully renewed and continued said association, combination, conspiracy and agreement, and so associated together and so combining, conspiring and agreeing, agreed as follows:

(a) That neither defendant PWC nor defendant FEC nor [fol. 17] any member of either of said Conferences should disclose to any shipper information regarding rate changes and/or the position of either Conference or of any member of either Conference regarding rate requests, and agreed to a written "Joint Memorandum of Decisions" wherein

and whereby it was provided "that unauthorized disclosure to shippers of information regarding rate changes and/or the position of an individual Conference or any Member thereof, regarding rate requests is contrary to the spirit of the Joint Agreement";

(b) That defendants (and not PWC alone agreeably to said Agreement No. 57) would fix and agree upon the rates for transportation of commodities by water by members of defendant PWC in said trade from Pacific Coast ports of the United States to the Far East (the Philippine Islands included) and that the rates so fixed and agreed upon should then be given out and to shippers by defendant PWC falsely pretending to act as such and under said Agreement No. 57 and should be adhered to and charged by defendants providing transportation by water from Pacific Coast ports of the United States to the Far East and the Philippine Islands;

(c) That defendant PWC, contrary to the provisions of said Agreement No. 57 and said Agreement No. 8200, would make no change in any rate established by it or fixed as aforesaid and to be charged by its members for transportation of commodities by water from Pacific Coast ports of the United States to the Far East (Manila, Philippine Islands included), without the concurrence of defendant FEC, except a rate for a commodity included in a list established by defendants acting pursuant to said secret and unlawful association, combination, conspiracy and agreement and known as a "list of initiative items" in respect of which defendant PWC might establish rates without the concurrence of defendant FEC; and

(d) That certain specified commodities should be on the said list of initiative items.

19. The above referred to list of initiative items did not [fol. 18] include condensed and/or evaporated milk until "Item No. 1350—Milk, condensed and evaporated" was included in said list by joint action of defendants in May 1961, as hereinafter averred.

20. The said association, combination and conspiracy referred to in paragraph 18 above never submitted to the jurisdiction of the Federal Maritime Board or its successor the Federal Maritime Commission and was never a carrier or a common carrier, by water or otherwise, and never carried on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. There was never filed with said Board or Commission nor filed with said Board or Commission for approval, nor approved by it, said agreement averred in paragraph 18 above, or a true copy thereof, or any true or complete or any memorandum thereof.

21. Defendants, associated together and combining, conspiring and agreeing as hereinabove averred and while said Agreements No. 57 and No. 8200 were in effect, did the things they had combined, conspired and agreed to do and the things hereinafter averred to have been done by them and for that purpose and for the purpose of carrying out the association, combination, conspiracy and agreement referred to in paragraph 18 above agreed upon and fixed rates for transportation by water from Pacific Coast ports of the United States to the Far East, and in so acting and issuing rates for evaporated milk as hereinafter alleged, acted by and through defendant PWC at San Francisco, California.

22. In 1951 PWC, acting agreeably to said Agreement No. 57 fixed and established the rates to be charged by its members for transportation of evaporated milk by water from the Pacific Coast ports of the United States to the Philippine Islands. Said rates were adhered to and charged by the members of PWC except as hereinafter averred. Before May 1957 defendants, acting as alleged in paragraph 18 above, agreed that the rates for transportation by water by members of defendant PWC from Pacific [fol. 19] Coast ports of the United States to the Philippine Islands for evaporated milk should be increased by $2.50 per ton and that defendant PWC, pretending to act agree-

ably to the provisions of said Agreement No. 57, should state and circulate said increase as effective May 1, 1957.

23. Before May 1, 1957, and effective as of May 1, 1957, PWC did, in fact, so announce and circulate said increase in said rates, and over plaintiff's protest defendants put into effect and applied said increased rates. In so doing defendants falsely pretended that PWC was acting lawfully and agreeably to said Agreement No. 57. In truth and in fact, in so doing, defendants were acting agreeably and pursuant to said unlawful combination, conspiracy and agreement averred in paragraph 18 above and the said agreement of defendants averred in paragraph 22 above. Said increased rates were thereafter charged and collected from plaintiff by the members of PWC for transportation by water of evaporated milk from the Pacific Coast ports of the United States to the Philippine Islands, until said rates were reduced as hereinafter stated.

24. In November 1957, plaintiff, in order to help it in meeting European competition in the sale of evaporated milk in the Philippine Islands and upon that ground which was then stated to defendant PWC, requested of defendant PWC that it reduce said increased rates on evaporated milk by $2.50 per ton and reduce them to the rates established and in effect before May 1, 1957.

25. Acting upon said request of plaintiff and on February 19, 1958, defendant PWC determined that said request should be granted and that the said rates on evaporated milk should be reduced as requested subject, however, to the concurrence of defendant FEC and thereupon requested of defendant FEC that it concur in said reduction. Defendant FEC declined to concur in said reduction so requested by defendant PWC and defendant PWC thereupon, and agreeably to the association, combination, conspiracy and agreement hereinabove averred in paragraph 18, withdrew [fol. 20] its said request for concurrence and no reduction in said rates was made except as hereinafter stated.

26. Thereafter defendant PWC, by writing, advised plaintiff that plaintiff's said request for reduction of the rates on evaporated milk was refused and represented to plaintiff as follows: "The members of the Pacific Westbound Conference have given long and careful study to your request that the rate for canned milk be reduced by $2.50 per ton. * * * our member lines were initially disposed to grant a reduction in the rate * * * This position has, however, been again reviewed and the required majority of the lines are now of the view that a reduction in the ocean freight rate would not materially affect the competitive position of American versus European supplier. * * * This entire matter has nevertheless again been carefully reviewed and the members of this Conference have agreed that at this time no further downward adjustment can be made in the freight rate applicable to canned, condensed and evaporated milk in the United States to Orient trade." Said statement and representation was false, and was then known to defendant PWC to be false, and defendant PWC then knew, and it was the fact, that plaintiff's said request for reduction of rates, as aforesaid, was declined by reason of the refusal of defendant FEC to concur in the said reduction. Said statement and representation was made agreeably to the association, combination, conspiracy and agreement averred in paragraph 18, and to that part thereof that "information regarding rate changes and/or the position of an individual Conference or any Member thereof regarding rate requests" not be disclosed to shippers.

27. Plaintiff had no knowledge of said secret association, combination, conspiracy or agreement or of the reason for said increase in the said rates on evaporated milk or of the true reason why its request for reduction of the said rates was declined, or of any facts which might have led to the discovery of those facts until it first became aware of the facts in May 1961 through disclosure made in May 1961 in the course of a proceeding being conducted by the [fol. 21] Federal Maritime Board and its successor and could not have discovered the same earlier by reason of the

agreement of defendants that the said facts be kept secret and by reason of the fact that defendants did in fact keep them secret from shippers as they had agreed to do, and theretofore plaintiff had in fact relied upon the representations made to it by defendant PWC.

28. The said rates on evaporated milk fixed and increased as aforesaid were kept in force and effect until May 7, 1962. In May 1961, defendants agreed that condensed and evaporated milk be included on the list of initiative items hereinabove referred to, and thereupon condensed and evaporated milk were so included as "Item No. 1350 Milk, Condensed and Evaporated". Thereafter effective on May 7, 1962 defendant PWC reduced the rates on evaporated milk for transportation by water from the Pacific Coast ports of the United States to the Philippine Islands by $2.50 per ton and to the rates which had applied prior to May 1, 1957 and after May 7, 1962 the said reduced rates were charged and collected for said transportation.

29. From before May 1, 1957, plaintiff sold to buyers in the Philippine Islands and shipped to Manila in the Philippine Islands from Pacific Coast ports of the United States evaporated milk and did so by defendant carriers who were members of defendant PWC. Plaintiff was forced to so ship by said defendant carriers by reason of the fact that said defendant carriers were the only carriers providing the type of transportation herein alleged to have been provided by them and were the only carriers by whom plaintiff, in the course of its said business, could ship to the Philippine Islands. For said shipments plaintiff was charged, and was forced to and did pay, the rates for transportation of evaporated milk fixed and made effective as hereinabove alleged. Plaintiff did not increase the price at which it sold its said evaporated milk in the Philippine Islands by reason of the said increased ocean freight rates which it was required to and did pay.

[fol. 22] 30. By reason of the premises and as a result of the aforesaid unlawful association, combination, conspiracy

and agreement in violation of the antitrust laws of the United States and the aforeaverred violations by the defendants of the antitrust laws of the United States and the aforesaid exacting from plaintiff the aforesaid increase in rates on evaporated milk plaintiff has been injured in its business and property in the amount of Three Hundred Forty-three Thousand Two Hundred Seventy-six and 70/100 Dollars ($343,276.70). It has been necessary for plaintiff to employ, and it has employed, attorneys to bring and prosecute this action under the antitrust laws of the United States.

Wherefore plaintiff prays:

1. That the association, combination, conspiracy and agreement of defendants, and their conduct and acts in pursuance thereof be decreed violations of the antitrust laws of the United States; and

2. That plaintiff do have and recover from defendants its damages in the sum of Three Hundred Forty-three Thousand Two Hundred Seventy-six and 70/100 Dollars ($343,276.70) trebled to One Million Twenty-nine Thousand Eight Hundred Thirty and 10/100 Dollars ($1,029,830.10) agreeably to the antitrust laws of the United States; plus

3. Plaintiff's cost of suit, including a reasonable attorney's fee; and have

4. Such other, further and different relief as, the premises considered, is proper.

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Dunne & Phelps, By Arthur B. Dunne, Attorneys for Plaintiff, Carnation Company.

[fol. 23] [File endorsement omitted]

Edward D. Ransom, William H. King, Lillick, Geary, Wheat, Adams & Charles, 311 California Street, San Francisco 4, California, GArfield 1-4600,

Herman Goldman, Elkan Turk, Elkan Turk, Jr., Sol D. Bromberg, Of Counsel, 120 Broadway, New York 5, New York,

Attorneys for Defendants, Members and former Members of the Far East Conference.

In the United States District Court

For the Northern District of California

Southern Division

Civil No. 41153

Carnation Company, a corporation, Plaintiff,

vs.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, et al., Defendants.

Motion to Dismiss—Filed March 1, 1963

The defendants, members and former members of the Far East Conference who raise no question regarding the validity of the service of process upon them, and who are named in the schedule annexed hereto, move the Court to dismiss the action on the grounds;

(1) That the complaint herein fails to state a claim upon which relief can be granted, in that the complaint charges that the acts therein alleged constitute violations of the antitrust laws, whereas the acts alleged in

the complaint constitute charges of violations of the [fol. 24] provisions of the Shipping Act, 1916, as amended, which, to the extent of said acts and charges, supersedes the antitrust laws mentioned and referred to in the complaint and the remedy for said acts and charges is that afforded by the Shipping Act, 1916, as amended; and

(2) That this Court is without jurisdiction of the subject matter

(a) in that agreements between common carriers by water and conferences of common carriers by water in foreign commerce in respect of competition and co-operative arrangements and the practices adopted by such carriers in connection with rates established by them pursuant to such agreement between common carriers by water and/or conferences of such carriers in the foreign commerce are within the exclusive jurisdiction of the Federal Maritime Commission under the Shipping Act, 1916, as amended; and

(b) in that the alleged acts of the defendants set forth in the complaint are alleged to have occurred in respect of matters subject to the jurisdiction, supervision and regulation of the Federal Maritime Commission, which is authorized by the Shipping Act, 1916, as amended, to afford complete remedy by means of investigation, decision and appropriate order; and

(3) That there is pending a quasi-judicial proceeding before the Federal Maritime Commission in which the plaintiff herein has intervened, adduced evidence, cross-[fol. 25] examined witnesses, and submitted briefs, and in which substantially the same issues tendered by the complaint herein will be decided by the governmental agency having primary jurisdiction of the subject matter, whose decision will be subject to judicial review in an appropriate United States Court of Appeals.

The motion is based upon the attached Memorandum in Support and upon all of the pleadings herein.

Dated: This 28th day of February, 1963.

Lillick, Geary, Wheat, Adams & Charles, Edward D. Ransom.

Herman Goldman, Elkan Turk, Elkan Turk, Jr., Sol D. Bromberg, Of Counsel, 120 Broadway, New York 5, N. Y.

[fol. 26]

ATTACHMENT TO MOTION

DEFENDANTS ON WHOSE BEHALF THIS MOTION IS MADE

Ellerman Lines, Limited, Ellerman & Bucknall Steamship Co., Limited, The City Line, Limited and Hall Line, Limited, doing business as Ellerman & Bucknall Associated Lines—Joint Service; Lykes Bros. S. S. Co., Inc.; Mitsubishi Kaiun Kaisha, Ltd.; Orient Mid-East Lines; Prince Line, Ltd.; United States Lines Company; The De La Rama Steamship Co., Inc., The Swedish East Asia Co., Ltd., The Ocean Steamship Co., Ltd., the China Mutual Steam Navigation Company, Ltd. and Nederlandschi Stoomvaart Maatschappij "Oceaan" N.V. doing business as De La Rama Lines—Joint Service; Skibsaktieselskapet Varild, Skidsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteressentskabet Garonne, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, Aktieselskabet Standard and Fearnley & Egers Befragtningsforretning A/S, doing business as Fern-Ville Far East Lines—Fearnley & Eger and A. F. Klaveness & Co., A/S; Skibsaktieselskapet Igadi, Aktieselskapet Ivarans Rederi, A/S Besco, and A/S Lise, doing business as Ivaran Lines—Far East Service—Joint Service; Dampskibsselskabet Af 1912, Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg, doing business as A. P. Moller-Maersk Line—Joint

Service; A/S Den Norski Afrika-Og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, A/S Tankfart VI, doing business as Wilhelmsens Dampskibsaktieselskab; American President Lines, Ltd.; Daido Kaiun Kaisha, Ltd.; Isthmian Lines, Inc.; Kawasaki Kisen Kaisha, Ltd.; Iino Kaiun Kaisha, Ltd.; Maritime Company of Philippines, Inc.; Mitsui Steamship Company, Ltd.; Nissan Kaisen Kaisha, Ltd.; Nippon Yusen Kaisha (also known as N.Y.K. Line); Osaka Shosen Kaisha, Ltd.; Pacific Transport Lines, Inc.; Philippine National Lines; Shinnihon Steamship Co., Ltd.; States Marine Lines, Inc. [fol. 27] (also known as Global Bulk Transport Corporation); States Marine Corporation; States Marine Corporation of Delaware; United Philippine Lines, Inc.; Waterman Steamship Corporation; Yamashita Kisen Kaisha; and The Far East Conference.

NOTICE OF MOTION TO DISMISS PROCEEDINGS

Please Take Notice that the undersigned will bring the above motion on for hearing before the Law and Motion Department of the above-entitled Court on the 11th day of March, 1963, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard.

Dated at San Francisco, California, the 1st day of March, 1963.

Edward D. Ransom, Lillick, Geary, Wheat, Adams & Charles, Herman Goldman, Elkan Turk, Jr., Of Counsel, Attorneys for Defendant Far East Conference, et al.

[fol. 28] [File endorsement omitted]

Edward D. Ransom, Lillick, Geary, Wheat, Adams & Charles, 311 California Street, San Francisco 4, California, GArfield 1-4600, Attorneys for Defendants as Named Below.

In the United States District Court

For the Northern District of California

Southern Division

Civil No. 41153

Carnation Company, a corporation, Plaintiff,

vs.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, et al., Defendants.

Motion to Dismiss—Filed March 1, 1963

Defendants named below pursuant to the Rules of Civil Practice of this Honorable Court and the Federal Rules of Civil Procedure move this Court to dismiss the complaint herein on the ground that the Shipping Act, 1916, as amended, 46 U.S.C., Sections 801-840, provides the exclusive remedy for each and every wrong alleged by said complaint and that, as a consequence, this Court is without jurisdiction to proceed as the matter is subject to the exclusive primary jurisdiction of the Federal Maritime Commission.

The motion is based upon the attached Memorandum in Support and upon all of the pleadings herein.

The defendants on whose behalf this motion is brought are: Pacific Westbound Conference, W. C. Galloway and the following carriers individually and as members of the [fol. 29] Pacific Westbound Conference: N.V. Stoomvaart

Maatschappij "Nederland," Koninklijke Rotterdamsche Lloyd N.V., Skibsaktieselskapet Arizona, Skibsaktieselskapet Astrea, Skibsaktieselskapet Aruba, Skibsaktieselskapet Noruega, Skibsaktieselskapet Abaco and A/S Atlantica doing business under the name Java Pacific & Hoegh Lines—Joint Service; Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville and Skibsaktieselskapet Goodwill doing business under the name of Klaveness Line—Joint Service; Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth, Skibsaktieselskapet Ogeka and Hvalfangstaktieselskapet Suderoy doing business under the name Knutsen Line—Joint Service; Skipsaktieselskapet Nordheim, Skipsaktieselskapet Vito, Skipsaktieselskapet Kirkoy, Skipsaktieselskapet Skagerek (Ditley-Simonsen Lines) and Transatlantic Steamship Company, Ltd. of Gothenburg doing business as Pacific Orient Express Line—Joint Service; American Mail Line, Ltd.; Mitsubishi Shipping Co., Ltd.; Nippon Kisen Kaisha, Ltd. (sometimes doing business as and known as Nissan Pacific Line); Nitto Shosen Co., Ltd., Pacific Far East Line, Inc.; Pacific Transport Lines, Inc.; States Steamship Company; Transocean Transport Corp. (sometimes doing business as Magsaysay Lines); Orient Steam Navigation Co., Ltd.; P&O—Orient Lines; The De La Rama Steamship Co., Inc., The Swedish East Asia Co., Ltd., The Ocean Steamship Co., Ltd., The China Mutual Steam Navigation Company, Ltd., and Nederlandschi Stoomvaart Maatschappij "Oceaan" N.V. doing business as De La Rama Lines—Joint Service; Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskapet Glittre, Dampskibsinteressentskabet Garoone, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskapet International, Skibsaktieselskapet [fol. 30] Mandeville, Skibsaktieselskapet Goodwill, Aktieselskabet Standard and Fearnley & Egers Befragtningsforretning A/S doing business as Fern-Ville Far East Lines

—Fearnley & Eger and A. F. Klaveness & Co. A/S; Skibsaktieselskapet Igadi, Aktieselskapet Ivarans Rederi, A/S Besco and A/S Lise doing business as Ivaran Lines—Far East Service—Joint Service; Dampskibsselskabet Af 1912, Aktieselskab and Aktieselskapet Dampskibsselskabet Svendborg doing business as A. P. Moller-Maersk Line—Joint Service; A/S Den Norski Afrika-Og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI doing business as Wilhelmsens Dampskibsaktieselskab; American President Lines, Ltd.; Daido Kaiun Kaisha, Ltd.; Isthmian Lines, Inc.; Kawasaki Kisen Kaisha, Ltd.; Iino Kaiun Kaisha, Ltd.; Maritime Company of the Philippines, Inc.; Mitsui Steamship Company, Ltd.; Nissan Kaisen Kaisha, Ltd.; Nippon Yusen Kaisha (also known as N.Y.K. Line); Osaka Shosen Kaisha, Ltd.; Pacific Transport Lines, Inc.; Philippine National Lines; Shinnihon Steamship Co., Ltd.; States Marine Lines, Inc. (also known as Global Bulk Transport Corporation); States Marine Corporation; States Marine Corporation of Delaware; United Philippine Lines, Inc.; Waterman Steamship Corporation and Yamashita Kisen Kaisha.

Dated: This 1st day of March, 1963.

Edward D. Ransom, Lillick, Geary, Wheat, Adams & Charles, Attorneys for Defendants, Pacific Westbound Conference, et al.

Notice of Motion to Dismiss Proceedings

Please Take Notice that the undersigned will bring the above motion on for hearing before the Law and Motion Department of the above entitled Court on the 11th day [fol. 31] of March, 1963, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard.

Dated at San Francisco, California, the 1st day of March, 1963.

Edward D. Ransom, Lillick, Geary, Wheat, Adams & Charles, Attorneys for Defendants, Pacific Westbound Conference, et al.

[fol. 32] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil Action No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, et al., Defendants.

MOTION TO INTERVENE AS DEFENDANT—Filed March 1, 1963

The Federal Maritime Commission moves this honorable Court for leave to intervene herein pursuant to Rule 24 of the Federal Rules of Civil Procedure as a defendant in this proceeding for the purpose of moving this Court to dismiss the complaint herein on the grounds stated in the motion to dismiss submitted herewith.

The grounds of this motion are set forth in the attached memorandum.

Dated this 1st day of March, 1963.

James L. Pimper, General Counsel, Robert E. Mitchell, Deputy General Counsel, Robert B. Hood, Jr., Attorney Federal Maritime Commission, By Robert B. Hood, Jr., Attorneys for Defendant-Intervener, Federal Maritime Commission.

[fol. 33]

NOTICE OF MOTION

To:

Arthur B. Dunne, Esq., Attorney for Plaintiff, Dunne, Dunne & Phelps, 333 Montgomery Street, San Francisco 4, California.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room , United States Court House, Seventh and Mission Streets, San Francisco, California on the 11th day of March, 1963, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: Robert B. Hood, Jr., Attorney for Defendant-Intervener, Federal Maritime Commission, Washington 25, D. C.

[fol. 34] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil Action No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, et al., Defendants,

and

THE FEDERAL MARITIME COMMISSION, Defendant-Intervener.

MOTION TO DISMISS—Filed March 1, 1963

The Federal Maritime Commission, defendant-intervener, moves this Court to dismiss the complaint herein on the

ground that the Shipping Act, 1916, (46 U.S.C. 801 et seq.) provides the exclusive remedy for the wrongs alleged in the complaint and therefore this honorable Court is without jurisdiction in this matter.

The arguments and authorities in support of this motion are set forth in the attached memorandum.

Dated this 1st day of March, 1963.

James L. Pimper, General Counsel, Robert E. Mitchell, Deputy General Counsel, Robert B. Hood, Jr., Attorney, Federal Maritime Commission, By Robert B. Hood, Jr., Attorneys for Defendant-Intervener, Federal Maritime Commission.

[fol. 35]

NOTICE OF MOTION

To:

Arthur B. Dunne, Esq., Attorney for Plaintiff, Dunne, Dunne & Phelps, 333 Montgomery Street, San Francisco 4, California.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room , United States Court House, Seventh and Mission Streets, San Francisco, California on the 11th day of March, 1963, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: Robert B. Hood, Jr., Attorney for Defendant-Intervener, Federal Maritime Commission, Washington 25, D. C.

[fol. 36] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil Action No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, et al., Defendants,

and

THE FEDERAL MARITIME COMMISSION, Defendant-Intervener.

INTERVENER'S ANSWER—Lodged March 1, 1963 and Filed April 30, 1963

The Federal Maritime Commission, defendant intervener, has pending before it an evidentiary investigatory proceeding entitled Docket 872, which involves substantially the same issues and defendants as in the complaint on file in this court. For defendant intervener either to admit or to deny the factual allegations of the complaint might be construed as, in effect, pre-judging its own proceeding. Defendant intervener's sole purpose in participating in this proceeding is to move the court to dismiss the complaint because the exclusive primary jurisdiction of the matters alleged in the complaint are in the Federal Maritime Commission.
[fol. 37] To the extent that the rules of pleading require an assumption of the admission or denial of the allega-

tions of the complaint for purposes of a motion to dismiss on jurisdictional grounds, such assumption is made.

Dated this day of February, 1963.

James L. Pimper, General Counsel, Robert E. Mitchell, Deputy General Counsel, Robert B. Hood, Jr., Attorney, Federal Maritime Commission, By Robert B. Hood, Jr., Attorneys for Defendant-Intervener, Federal Maritime Commission.

[fol. 38]

Affidavit of Thomas Lisi, Secretary, Federal Maritime Commission

District of Columbia ss.

Thomas Lisi, being first duly sworn, deposes and says:

1. I am the Secretary of the Federal Maritime Commission and as such am acquainted with the files and records of the Federal Maritime Commission and proceedings brought before that Commission. By order of October 26, 1959 of the Federal Maritime Board, predecessor agency to the Federal Maritime Commission, an investigatory proceeding was instituted to ascertain whether FMB Agreement No. 8200 between the member lines of the Far East Conference and the members lines of the Pacific Westbound Conference should continue to be approved, whether the parties have entered into agreements outside Agreement 8200, whether there has been a violation of Sections 15, 16, or 17 of the Shipping Act, 1916, and other matters as set forth in the order. A true copy of the order instituting such investigation, which proceeding is designated Docket No. 872, is attached to this Affidavit as Exhibit 1.

2. The Carnation Company petitioned the Federal Maritime Board to intervene in Docket 872. A ruling authorizing such intervention was issued. Thereafter Carnation Company participated in the proceeding. A true copy of the Petition to Intervene and the ruling authorizing such intervention are attached as Exhibits 2 and 3.

3. On adoption of Reorganization Plan No. 7 of 1961 (which became effective August 12, 1961) by which the Federal Maritime Board was abolished and the Federal Maritime Commission created, the Federal Maritime Com- [fol. 39] mission on August 12, 1961 by General Order No. 1 took over and continued all proceedings of the Federal Maritime Board, including the proceeding in Docket 872.

4. The current status of Docket 872 is that extensive hearings before Chief Examiner Basham in various places in the United States have been held, briefs by the parties, including the Carnation Company have been filed, and the matter has been submitted for decision by the Examiner, following which it will be considered by the Commission.

5. A true copy of a portion of Carnation Company's brief in Docket 872 is attached hereto as Exhibit 4.

6. A true copy of Agreement 8200 between the member lines of the Pacific Westbound Conference and the Far East Conference is attached marked Exhibit 5.

Thomas Lisi

Subscribed and sworn to before me this 21st day of February, 1963.

Ruth May Burroughs, Notary Public in and for the District of Columbia. My Commission Expires May 31, 1967.

[Seal]

[fol. 40]

Exhibit 1 to Affidavit

(S E R V E D)
(OCTOBER 26, 1959)
(Federal Maritime Board)

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its Office in Washington, D. C., this 26th day of October 1959.

DOCKET NO. 872

AGREEMENT NO. 8200—JOINT AGREEMENT BETWEEN THE MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

IT APPEARING, that the member lines of the Far East Conference and Pacific Westbound Conference are parties to a certain Agreement No. FMB 8200 approved by the Federal Maritime Board pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814), and pursuant to that agreement act jointly for the purpose of establishing the rates and rules and regulations relating to the transportation by them of commodities exported from the United States to Far East destinations, and

IT FURTHER APPEARING, that protests against said agreement have been received from shippers and other persons, and

IT FURTHER APPEARING, that the public interest requires an investigation and hearing by this Board for the purpose of determining whether said Agreement No. 8200 should be (1) granted continued approval, (2) modified, or (3) disapproved,

NOW THEREFORE, pursuant to sections 15, 16, 17, and 22 of the Shipping Act, 1916, as amended (46 U.S.C. 814, 815, 816 and 821),

IT IS ORDERED, that the Board, upon its own motion, enter upon an investigation and hearing to determine whether said Agreement No. 8200 is a true and complete [fol. 41] agreement of the parties within the meaning of said section 15 and whether it is being carried out in a manner which makes it unjustly discriminatory or unfair between carriers, shippers, exporters, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of the Shipping Act, 1916, as amended,

IT IS FURTHER ORDERED, that the member lines of the Far East Conference and Pacific Westbound Conference be, and they are hereby, made respondents in this proceeding, and

IT IS FURTHER ORDERED, that this order be published in the Federal Register and that a copy of such order be served upon all respondents herein, and

IT IS FURTHER ORDERED, that this proceeding be set for hearing before an examiner of the Board's Hearing Examiners Office at a place and date to be fixed by the Chief Examiner.

By the Board.

S/ James L. Pimper
Secretary

(SEAL)

USCOMM-MA-DC

[fol. 42]

Exhibit 2 to Affidavit

[Stamp—Received—Aug 22 3:33 PM '60—Hearing Examiners' Office—Federal Maritime Board—Acknowledged ....]

[Stamp—Served—Sep 3 1960—Federal Maritime Board]

BEFORE THE

FEDERAL MARITIME BOARD

PETITION OF CARNATION COMPANY TO INTERVENE

Docket No. 872

AGREEMENT NO. 8200—JOINT AGREEMENT BETWEEN THE MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

Your petitioner, CARNATION COMPANY, respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I. That petitioner is now and at all times herein mentioned has been a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office in the City of Los Angeles, State of California, whose principal business is manufacturing and processing of various food products, including animal and poultry feeds, the said product of petitioner being sold throughout the United States and elsewhere.

[fol. 43] II. That petitioner has for many years past shipped and expects to continue shipping its products from the Pacific Coast range of ports to the Phillipine Islands and other destinations, subject to the rates, rules and regulations as found in tariffs issued by member lines of the Pacific Westbound Conference.

III. That petitioner has reasonable grounds to believe that the said rates, rules and regulations, as hereinabove referred to in Section II have been the subject of and resulted from negotiations between the member lines of the Far East Conference and member lines of the Pacific Westbound Conference to the detriment of petitioner and shippers in a position similar to that of petitioner with respect to shipping similar products to the Far East.

IV. That petitioner can, if allowed to become a party to this proceeding, without unduly broadening the issues therein, take proper steps to safeguard petitioners future shipments to the Far East which undoubtedly will continue to be transported ad litem and after termination of the instant proceeding.

WHEREFORE, said petitioner, CARNATION COMPANY, respectfully requests leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at Los Angeles, California, this 16th day of August, 1960.

H. E. Olson (Signed)
H. E. Olson, Vice President
Carnation Company
5045 Wilshire Boulevard
Los Angeles 36, California

C. S. Connolly (Signed)
C. S. Connolly, Attorney
For Petitioner

Communications in regard to this Petition should be addressed to:

C. S. Connolly, Esq.
5045 Wilshire Blvd.
Los Angeles 36, California

[fol. 44]

VERIFICATION

STATE OF CALIFORNIA)
) SS.:
CITY AND COUNTY OF LOS ANGELES)

H. E. Olson, being first duly sworn on oath deposes and says that he is Vice President of CARNATION COMPANY, a Corporation, and is the person who signed the foregoing petition; that he has read the petition and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

H. E. OLSON (Signed)
H. E. Olson

Subscribed and sworn to before me, a notary public in and for the State of California, City and County of Los Angeles, this 16th day of August, A. D. 1960.

HARRY A. ROGAHN (Signed)
H. A. Rogahn, Notary Public

My Commission expires January 28th, 1961.

(SEAL)

[fol. 45]

Exhibit 3 to Affidavit

(S E R V E D
(SEPTEMBER 8, 1960
(Federal Maritime Boar

FEDERAL MARITIME BOARD

WASHINGTON 25, D. C.

September 8, 1960

No. 872

AGREEMENT NO. 8200—JOINT AGREEMENT BETWEEN THE MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

RULING ON PETITIONS TO INTERVENE

Petitions to intervene herein having been filed by Th Northern California Ports and Terminals Bureau, Inc., an Carnation Company, and good cause appearing, said pet tions are hereby granted.

Interveners are reminded that documents filed in this pr ceeding such as motions, petitions, etc., must be serve upon all parties of record, a list of whom are on file in th Board's Office of Hearing Examiners, Washington, D. C.

/s/ G. O. Basham
G. O. Basham
Presiding Examiner

USCOMM-MA-DC

[fol. 46]

Exhibit 4 to Affidavit

Extract From Page 8 of Brief Dated October 5, 1962, Filed by Carnation Company in Federal Maritime Commission Docket No. 872.

"As far as Carnation Company is concerned, it has never had any say as to whether or not the rates on evaporated milk should be granted local initiative or not. As a matter of fact, our source of knowledge on the existence and operation of local initiative arrangements comes only as a result of the Commission's institution of the present investigation. Here is an action by the Respondents which goes to the very heart of rate making, and without doubt had this rate making procedure been known to Carnation Company, a complaint would have been filed with the Commission against this unfair, unjust and discriminatory conference activity. Here is a rate procedure which has had tremendous affect upon Carnation Company efforts to meet European competition in the Philippine Islands and we have had no notice of such procedure operating within the conference."

[fol. 47]

Exhibit 5 to Affidavit

Copy of
Federal Maritime Board
Agreement No. 8200
Approved 12/29/52

Far East Conference

and

Pacific Westbound Conference

AGREEMENT made in the City of New York this fifth day of November, 1952, by and between the parties who shall execute this AGREEMENT at the foot hereof under

the caption "Members of the Pacific Westbound Conference", who are hereinafter sometimes collectively referred to as the PACIFIC LINES, and the parties who shall execute this AGREEMENT at the foot hereof under the caption "Members of the Far East Conference", who are hereinafter sometimes collectively referred to as the ATLANTIC/GULF LINES.

WITNESSETH:

1. The PACIFIC LINES are parties to an agreement which has been designated Federal Maritime Board Agreement No. 57, as amended, which designates the parties thereto as the Pacific Westbound Conference; and whenever reference is hereinafter made to action which is required or permitted to be taken by the PACIFIC LINES, such reference is intended to refer to action such as is required to effect the establishment or change of rates pursuant to said Agreement No. 57, as amended.

2. The ATLANTIC/GULF LINES are parties to an agreement which has been designated Federal Maritime Board Agreement No. 17, as amended, which designates the parties thereto as the Far East Conference; and whenever reference is hereinafter made to action which is required or permitted to be taken by the ATLANTIC/GULF LINES, such reference is intended to refer to action such as is required to effect the establishment or change of rates pursuant to said Agreement No. 17, as amended.

3. The PACIFIC LINES operate vessels as common carriers of cargo from Pacific Coast ports of the United States and Pacific Coast ports of Canada to certain ports in the Far East; and the ATLANTIC/GULF LINES operate vessels as common carriers of cargo from United States Atlantic and Gulf ports to some of the same ports in the Far East; and action taken hereunder shall apply to transportation of cargoes to all destinations which shall, from time to time, be common to the scope of both Agreements 57 and 17.

[fol. 48] 4. The purpose which the parties desire to accomplish hereby (which is hereinafter sometimes for brevity referred to as "the purpose of this agreement") is to assure to the parties hereto, as well as to the manufacturers, merchants, farmers and labor, whose products are exported from the United States to Far East destinations which may, from time to time, be common to the scope of both said Agreements 57 and 17, stability of ocean rates and frequency, regularity and dependability of service which is essential to their continued prosperity; and for the accomplishment of the purpose of this agreement it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates, except for the following commodities when shipped in bulk:

Coal	Barley
Coke	Rice
Phosphate Rock	Corn
Salt	Soyabeans
Ores	Oats
Wheat	Rye

which expected commodities are not included within the scope of this agreement.

NOW, THEREFORE, in consideration of the premises and of the mutual undertakings of the parties hereto, it is hereby agreed as follows:

FIRST: As promptly as possible after the approval of this agreement by the Federal Maritime Board, the parties shall hold a meeting which is hereinafter referred to as the "initial meeting." The initial meeting shall be held at a time and place to be mutually agreed upon by the parties hereto. If, however, prior to the 30th day after such approval the parties hereto shall not so have mutually agreed upon the time and place for the holding of the initial meeting, said initial meeting shall be held on the 40th day after such approval at the Fairmont Hotel in the City of San Francisco,

California; and if such 40th day shall fall on a Saturday, Sunday or legal holiday, said meeting shall be held on the second business day thereafter, at the same place. Such meeting shall be attended by representatives of the PACIFIC LINES and of the ATLANTIC/GULF LINES. All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the PACIFIC LINES, acting as a group, and of the ATLANTIC/GULF LINES, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates. The initial meeting shall make rules, not inconsistent with the provisions of this agreement, for the conduct of all meetings to be held hereunder, and for the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting.

[fol. 49] *SECOND*: Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of Lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by air mail, and a summary of the facts which justify the changes on said short notice. Forty-eight hours, or 72 hours, after the giving of such notice, dependent upon the medium by which such notice shall have been given, the notifying group may make such changes as stated in said notice and the other group may, at the end of 48 hours, or at the end of 72 hours, as the case may be, after the giving of such notice, make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or viola-

tion of this agreement. The parties shall, however, promptly give to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, copies of any notices and information with respect to any changes in tariffs given or made as provided for in this Article SECOND.

THIRD: The parties hereto shall, promptly after the adjournment of the initial meeting and of each subsequent meeting, file with the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, a record of all business transacted at said respective meeting.

FOURTH: Neither the PACIFIC LINES nor the ATLANTIC/GULF LINES shall admit new parties to their Conference Agreement unless such parties shall simultaneously become parties to this agreement by affixing their signatures under the appropriate caption or captions at the foot of this agreement or a counterpart thereof. Whenever any party hereto shall have ceased to be a party to Agreement No. 57 as amended, or a party to Agreement No. 17 as amended, or a party to both of said agreements, as the case may be, such party by such cessation shall cease also to be a party to this agreement; but so long as such party shall continue to be a party to either said Agreement No. 57 as amended, or Agreement No. 17 as amended, it shall also continue to be a party to this agreement. Prompt notice of the change of parties hereto shall be given by each group to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended.

FIFTH: Any notice required or permitted hereby to be given shall be given by telegram if telegraphic communication be available, otherwise by air mail, and if given to the PACIFIC LINES shall be addressed to the Secretary-Manager of the Pacific Westbound Conference at San Francisco, California, and if given to the ATLANTIC/GULF LINES shall be addressed to the Chairman of the Far East Conference, 11 Broadway, New York 4, New York. The

deposit of any such notice air mail, postage prepaid, in a United States Post Office letter box, or the deposit of any such telegram in an office of any telegraphic company, as the case may be, shall constitute the giving of such notice. Each of the groups of lines may, from time to time, change the address to which notices to it are to be dispatched by notice given to the other group.

[fol. 50] *SIXTH*: This agreement shall become effective when, but not until, the same shall have been approved by the Federal Maritime Board, pursuant to the provisions of Section 15, Shipping Act, 1916, as amended.

SEVENTH: Each Line, a party hereto, shall bear the expenses of its own representatives while attending any meetings held under the provisions hereof. The expenses of hiring the places where the meetings shall be held and such expenses incidental thereto as may be for the joint benefit of all of the parties hereto, shall be borne to the extent of one half thereof by the PACIFIC LINES as a group and one half thereof by the ATLANTIC/GULF LINES as a group.

EIGHTH: This agreement shall continue in effect for a period of nine months and shall continue thereafter until the ninetieth day after any one or more of the Lines, a party or parties hereto, shall have given to the PACIFIC LINES and to the ATLANTIC/GULF LINES and to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, notice of termination; and on said ninetieth day this agreement shall terminate and come to an end.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective officers or representatives and duly authorized as of the day and year hereinabove first written.

[fol. 51]

MEMBERS of the
PACIFIC WESTBOUND CONFERENCE

AMERICAN-HAWAIIAN STEAMSHIP COMPANY

By: (signed): J. A. STUMPF
J. A. Stumpf
Title: Assistant Vice President

AMERICAN MAIL LINE

By: (signed): A. R. LINTNER
A. R. Lintner
Title: President

AMERICAN PRESIDENT LINES, LTD.

By: (signed): W. K. VARCOE
W. K. Varcoe
Title: Vice President

CANADIAN PACIFIC RAILWAY COMPANY

By: (signed): K. M. FETTERLY
K. M. Fetterly
Title: Foreign Freight Traffic Manager

DE LA RAMA LINES—Joint Service
The De La Rama Steamship Co., Inc.
The Swedish East Asia Co., Ltd.
The Ocean Steamship Co., Ltd.
The China Mutual Steam Navigation Company, Ltd.
Nederlandsche Stoomvaart Maatschappij "Oceaan" N.V.
(Funch, Edye & Company, Inc., General Agents.)

By: (signed): V. H. ARNESEN
V. H. Arnesen
Title: Vice President

THE EAST ASIATIC COMPANY, LTD.

By: (signed): GEORGE J. GMELCH
George J. Gmelch
Title: Freight Traffic Manager

ISTHMIAN STEAMSHIP COMPANY

By: (signed): JAMES J. MCCABE
James J. McCabe
Title: Vice President—Traffic

JAVA PACIFIC & HOEGH LINES—Joint Service
N.V. Stoomvaart Maatschappij
"Nederland"
Koninklijke Rotterdamsche Lloyd, N.V.
Skibsaktieselskapet Arizona
Skibsaktieselskapet Astrea
Skibsaktieselskapet Aruba
Skibsaktieselskapet Noruega
Skibsaktieselskapet Abaco
A/S Atlantica
(Trans-Pacific Transportation
Company, Pacific Coast General
Agents.)

By: (signed): E. L. BARGONES
E. L. Bargones
Title: Vice President

[fol. 52]

MEMBERS of the
PACIFIC WESTBOUND CONFERENCE (continued)

KLAVENESS LINE—Joint Service
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad
Dampskibsaktieselskabet International
Skibsaktieselskapet Mandeville
Skibsaktieselskapet Goodwill
(A. F. Klaveness & Co., A/S)

By: (signed): C. L. BLOM
C. L. Blom
Title: Director

KNUTSEN LINE—Joint Service
Dampskibsaktieselskapet Jeanette Skinner
Skibsaktieselskapet Pacific
Skibsaktieselskapet Marie Bakke
Dampskibsaktieselskapet Golden Gate
Dampskibsaktieselskapet Lisbeth
(Inter-Ocean Steamship Corporation, Pacific Coast General Agents.)

By: (signed): HARRY BROWN
Harry Brown
Title: President

NIPPON YUSEN KAISHA (N.Y.K. LINE)
(James Griffiths & Sons, Inc., Agents)

By: (signed): WM. J. CLARK
Wm. J. Clark
Title: Vice President & General Manager

PACIFIC FAR EAST LINES INC.

By: (signed): T. E. CUFFE
T. E. Cuffe
Title: President

PACIFIC ORIENT EXPRESS LINE—Joint Service
Skipsaktieselskapet Nordheim
Skipsaktieselskapet Vito
Skipsaktieselskapet Kirkoy
Skipsaktieselskapet Skagerak
(Ditley-Simonsen Lines)
Transatlantic Steamship Company, Ltd., of Gothenburg
(General Steamship Corporation, Ltd., Agents.)

By: (signed): M. FRAZIER
M. Frazier
Title: Assistant Vice President

PACIFIC TRANSPORT LINES, INC.
By: (signed):
GEORGE E. TALMAGE, JR.
George E. Talmage, Jr.
Title: Vice President-Traffic

STATES MARINE CORPORATION/STATES MARINE CORPORATION OF DELAWARE
By: (signed):
JOHN TILNEY CARPENTER
John Tilney Carpenter
Title: Vice President

STATES STEAMSHIP CO.
By: (signed): J. R. DANT
J. R. Dant
Title: Vice President

WATERMAN STEAMSHIP CORPORATION
By: (signed):
J. W. O. VON HERBULIS
J. W. O. Von Herbulis
Title: Vice President

[fol. 53]

MEMBERS of the FAR EAST CONFERENCE

AMERICAN-HAWAIIAN STEAMSHIP COMPANY
By: (signed): J. A. STUMPF
J. A. Stumpf
Title: Assistant Vice President

AMERICAN PRESIDENT LINES, LTD.
By: (signed): A. A. ALEXANDER
A. A. Alexander
Title: Vice President

THE BANK LINE, LTD.
(Boyd, Weir & Sewell, Inc., Agents)
By: (signed): J. J. CLARK
J. J. Clark
Title: Vice President

DAIDO KAIUN KAISHA LTD.
(A. L. Burbank & Company, Ltd.
General Agents, U. S. Atlantic
and Gulf Ports.)

By: (signed):
A. L. Burbank, Sr.
A. L. Burbank, Sr.
Title: Chairman

DE LA RAMA LINES—Joint Service
The De La Rama Steamship Co., Ltd.
The Swedish East Asia Co., Ltd.
The Ocean Steam Ship Company, Ltd.
The China Mutual Steam Navigation
Co., Ltd.
Nederlandsche Stoomvaart Maatschappij
"Oceaan" N.V.
(Funch, Edye & Co., Inc., Agents)

By: (signed): V. H. Arnesen
V. H. Arnesen
Title: Vice President

ELLERMAN & BUCKNALL ASSOCIATED
LINES—Joint Service
Ellerman Lines, Limited
Ellerman & Bucknall Steamship Co.
Limited
The City Line, Limited
Hall Line, Limited
(Norton, Lilly & Company,
General Agents.)

By: (signed): S. S. Norton
S. S. Norton
Title: Partner

FERN-VILLE FAR EAST LINES—
FEARNLEY & EGER and
A. F. KLAVENESS & CO. A/S—
Joint Service
Skibsaktieselskapet Varild
Skibsaktieselskapet Marina

Aktieselskabet Glittre
Dampskibsinteressentskabet Garonne
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad
Dampskibsaktieselskabet International
Skibsaktieselskapet Mandeville
Skibsaktieselskapet Goodwill
(Fearnley & Eger, Inc., Agents)

By: (signed): NILS O. SEIM
Nils O. Seim
Title: Vice President

[fol. 54]

MEMBERS of the FAR EAST CONFERENCE
(continued)

ISTHMIAN STEAMSHIP COMPANY

By: (signed): JAMES J. MCCABE
James J. McCabe
Title: Vice President—Traffic

IVARAN LINES—FAR EAST SERVICE—
Joint Service
Skibsaktieselskapet Igadi
Aktieselskabet Ivarans Rederi
A/S Besco A/S Lise
(Stockard & Company, Inc.,
General Agents.)

By: (signed): J. J. HOLLORAN
J. J. Holloran
Title: Vice President

KAWASAKI KISEN KAISHA, LTD.
(Kerr Steamship Company, Inc.,
As Agents.)

By: (signed): CORTLAND LINDER
Cortland Linder
Title: Vice President

KOKUSAI LINE—Joint Service
Nissan Kaisen Kaisha, Ltd.
Toho Kaiun Kaisha, Ltd.
Iino Kaiun Kaisha, Ltd.

Mitsubishi Kaiun Kaisha, Ltd.
Kokusai Kaiun Kaisha, Ltd.
(Kokusai Kaiun Kaisha, Ltd.,
Operator & General Agent.)
(States Marine Corporation of
Delaware, General Agent.)

By: (signed):
JOHN TILNEY CARPENTER
John Tilney Carpenter
Title: Vice President

*LANCASHIRE SHIPPING COMPANY, LTD.
(Castle Line)
(American-Hawaiian Steamship
Company, Agents.)

By: (signed): J. A. STUMPF
J. A. Stumpf
Title: Assistant Vice President

*As Lancashire Shipping Company, Ltd.'s resignation from Far East Conference Agreement No. 17, as amended, becomes effective on December 1, 1952, it is understood that in accordance with Article FOURTH they shall cease to be a party to this Joint Agreement as of that date, and notice of such cessation shall be given to the Federal Maritime Board.

LYKES BROS. STEAMSHIP CO., INC.

By: (signed): R. C. COLTON
R. C. Colton
Title: Assistant Secretary

MOLLER-MAERSK LINE—Joint Service
Dampskibsselskabet Af 1912
Aktieselskab
Aktieselskabet Dampskibsselskabet Svendborg

By: (signed): TH HOST
Th Host
Title: Attorney-in-Fact

[fol. 55]

MEMBERS of the FAR EAST CONFERENCE
(continued)

MITSUI STEAMSHIP CO., LTD.
(William J. Rountree Co., Inc.,
General Agents.)

By: (signed): LESTER WOLFE
Lester Wolfe
Title: President

NIPPON YUSEN KAISHA
(Boyd, Weir & Sewell, Inc., Agents.)

By: (signed): J. J. CLARK
J. J. Clark
Title: Vice President

OSAKA SHOSEN KAISHA, LTD.
(American-Hawaiian Steamship
Company, Agents.)

By: (signed): W. J. TRACY
W. J. Tracy
Title: General Manager

PRINCE LINE, LTD.
(Furness, Withy & Co., Ltd., Agents)

By: (signed): J. J. WALSH
J. J. Walsh
Title: Local Director

SHINNIHON STEAMSHIP COMPANY, LTD.
(Texas Transport & Terminal Co.,
Inc., Agents.)

By: (signed): MELVIN P. BILLUPS
Melvin P. Billups
Title: Executive Vice President

STATES MARINE CORPORATION/STATES
MARINE CORPORATION OF DELAWARE

By: (signed):
JOHN TILNEY CARPENTER
John Tilney Carpenter
Title: Vice President

UNITED STATES LINES COMPANY
(American Pioneer Line)

By: (signed): P. E. McIntyre
P. E. McIntyre
Title: General Freight
Traffic Manager

WATERMAN STEAMSHIP CORPORATION

By: (signed):
J. W. O. Von Herbulia
J. W. O. Von Herbulia
Title: Vice President

WILHELMSENS DAMPSKIBSAKTIESELSKAB
A/S Den Norske Afrika-Og Australielinie
A/S Tonsberg
A/S Tankfart I
A/S Tankfart IV
A/S Tankfart V
A/S Tankfart VI
(Barber Steamship Lines, Inc.,
Agents.)

By: (signed): V. G. Barnett
V. G. Barnett
Title: President

[fol. 56]

MEMBERS of the FAR EAST CONFERENCE
(continued)

YAMASHITA KISEN KAISHA
(Norton, Lilly & Company,
General Agents.)

By: (signed): S. S. Norton
S. S. Norton
Title: Partner

USCOMM-MA-DC

[fol. 57] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil Action File No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al.; Defendants.

PLAINTIFF'S OBJECTION TO MOTION OF THE FEDERAL MARITIME COMMISSION FOR LEAVE TO INTERVENE AS DEFENDANT—Filed March 21, 1963

[fol. 58] Plaintiff, Carnation Company, a corporation, objects to the granting of the motion of the Federal Maritime Commission for leave to intervene herein as a defendant and for ground of objection shows as follows:

1. The Federal Maritime Commission has no interest in the subject matter of this action, or any part of the subject matter thereof or any other interest herein and does not present or suggest any matter of interest upon its part in any phase of this action.

2. The Federal Maritime Commission does not present, or seek to present, any claim or defense herein or any matter in aid of or connected with any matter of claim or defense herein and by its intervention does not seek to participate in the determination of any issue in this action but by its motion for leave to intervene and by its purported answer (tendered for filing, apparently, in attempted compliance with FRCP Rule 25 (c)) seeks to intervene not to

present any question of law or fact or any matter connected with any issue of law or fact in the action but solely for the purpose of moving to dismiss the action and the said answer sets forth no matter of claim or defense to this action.

3. In this action plaintiff does not rely for ground of claim upon any statute administered by the Federal Maritime Commission or any regulation, order, requirement or agreement issued or made pursuant to the Shipping Act of 1916 or any executive order and does not rely on any alleged nonapproval by the Federal Maritime Board or the Federal Maritime Commission as alleged in the complaint or otherwise and does not rely on any claim of violation of the Shipping Act of 1916 but relies in this action solely upon violation of the antitrust statutes of the United States and sets up the nonapproval, referred to in the complaint, only to show that there is no impediment to the claim made by plaintiff or to the operation of the antitrust statutes of the United States by reason of any provision of the Shipping Act of 1916.

[fol. 59] 4. The application for leave to intervene is not properly made and should not be granted under FRCP Rule 24 (b).

Respectfully submitted,

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Bledsoe, Smith, Phelps, Cathcart & Johnson, By Arthur B. Dunne, Attorneys for Plaintiff.

Authorities

Plaintiff will rely on the authorities in authority memorandum which plaintiff will file in opposition to the motions to dismiss.

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Bledsoe, Smith, Phelps, Cathcart & Johnson, By Arthur B. Dunne, Attorneys for Plaintiff.

Receipt of a copy of the foregoing objections is acknowledged this day of March, 1963.

Edward D. Ransom, William H. King, Lillick, Geary, Wheat, Adams & Charles, By H. D. Harris, Jr., Attorneys for Defendants.

[fol. 60] Certificate of Service by Mail (omitted in printing).

[fol. 61] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Before: Hon. William T. Sweigert, Judge.

No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants.

TRANSCRIPT OF HEARING ON MOTION TO DISMISS AND MOTION OF FEDERAL MARITIME COMMISSION FOR LEAVE TO INTERVENE AS DEFENDANT—April 8, 1963

[fol. 62] APPEARANCES:

On behalf of the Plaintiff:

Messrs. Dunne, Bledsoe, Smith, Phelps, Cathcart & Johnson, 315 Montgomery Street, San Francisco, California, By: Arthur B. Dunne, Esquire and James R. Baird, Jr., Esquire.

On behalf of Defendant Westbound Conference and defendant carriers in that Conference:

Messrs. Lillick, Geary, Wheat, Adams & Charles, 311 California Street, San Francisco, California, By: Edward D. Ransom, Esquire, William H. King, Esquire.

On behalf of Co-defendant Far East Conference:

Elkan Turk, Jr., Esquire, 120 Broadway, New York 5, New York.

On behalf of Defendant-Intervener Federal Maritime Commission:

Robert B. Hood, Jr., Esquire, Federal Maritime Commission, Washington 25, D. C.

[fol. 63]
Monday, April 8, 1963 2:00 o'clock p.m.

The Court: All right, gentlemen. Whenever you are ready.

The Clerk: Civil Action 41,153. Carnation Company versus Pacific Westbound Conference. Motion to dismiss and motion for Federal Maritime Commission for leave to intervene as defendant.

Will counsel please state their appearances for the record.

Mr. Ransom: Edward D. Ransom of Lillick, Geary, Wheat, Adams & Charles, counsel for the defendant Pacific Westbound Conference and the defendant carriers in that Conference.

With the leave of this Court, which I hope will be granted, Elkan Turk, Jr., from New York City for the Far East Conference and its member-line carriers, co-defendant in this case.

The Court: We are glad to grant the motion. We welcome you.

We had some lawyers in our last trial from New York. I hope we treated them all right.

Mr. Ransom: Also with the leave of the Court, Robert B. Hood, Jr., for the Federal Maritime Commission.

Mr. Dunne: For the plaintiff, Arthur B. Dunne and [fol. 64] James R. Baird, Jr.

Mr. Ransom: May I formally move for the admission for the purpose of this proceeding Mr. Elkan Turk, Jr., member of the Bar of New York, and Mr. Robert Hood, Jr., member of the Bar of Virginia.

The Court: No objection. I am glad to grant the motion for appearance in this court for this case.

Colloquy Between Court and Counsel

Gentlemen, I have read, as best I could, the memoranda and I have an abstract of the situation before me. I do not claim to know all about it, but as I understand it, this is an action brought under the Sherman and Clayton Acts. It is in the nature of an antitrust action against these defendants. It arises out of a claim that the defendants entered into an agreement to fix certain shipping rates, and the charge is that this was a conspiratorial agreement contrary to antitrust.

The defendants point out that any rates which they charge are supposed to be approved by the Federal Maritime Commission although these particular rates involved, as far as I can understand the matter, were not actually approved.

As I understand it, the fixing of rates without approval of the Federal Maritime Commission is unlawful and contrary to the terms of the Shipping Act itself.

The Federal Maritime Commission asks leave to intervene in this case for the purpose of making a motion to dismiss the Complaint. The defendants also move to dismiss the Complaint.

[fol. 65] The dismissals, as I understand it, are asked upon the ground that the Federal Maritime Commission has the primary exclusive jurisdiction over these matters.

The defendants, however, take the position, as I read your briefs, that since these particular rates were not approved by the Federal Maritime Commission that they are just an ordinary garden-variety part of some conspiratorial antitrust agreement and that the Federal Maritime Commission has nothing to do with it.

Let me ask this one question before we get going on the matter: Am I correct in assuming that it is admitted here that the rates which are the subject of this suit or a part of the alleged conspiracy were not in fact approved by the Federal Maritime Commission?

STATEMENT BY MR. RANSOM ON BEHALF OF DEFENDANT, WESTBOUND CONFERENCE, ET AL.

Mr. Ransom: If Your Honor please, that is approximately correct. It is not really the rate that is approved. It is the agreement, the method of fixing the rates, the agreement by which the rates were arrived at. It is our position, Your Honor, that in fact they were and that this is an issue in the case which will have to be determined in the case, whether or not the approvals of the agreements which have been approved cover the particular transaction of which the plaintiff complains.

The Court: Let me ask this question: Does the Shipping [fol. 66] Act contain provisions whereby shippers can under certain circumstances and with the approval of the Maritime Commission enter into agreed tariffs? Agree upon tariffs among themselves?

Mr. Ransom: You mean the carriers. Yes, it does.

The Court: That is why it has the provision that if that type of agreement is approved it is taken out of the antitrust action.

Mr. Ransom: It is our position, Your Honor, and I really have to almost argue the case to answer that, that while there is an express exception out of the antitrust for that which is approved, the exception from the antitrust laws under the cases which have been decided, under the doctrine of primary jurisdiction, whether approved or not approved,

it still comes within the Shipping Act, its set of regulations, and is taken out of the Court's power to—

The Court: You cite certain cases which you say hold that?

Mr. Ransom: Yes, Your Honor.

The Court: Do I understand you to say that these cases which you have cited actually hold as they appear to hold, that even though the rates involved or the agreements for rates involved have not been approved, actually approved, by the Maritime Commission, that nevertheless the subject matter of those agreements and rates is within the exclusive [fol. 67] primary jurisdiction of the Federal Maritime Commission?

Mr. Ransom: Very definitely, Your Honor.

The Court: If the cases hold as you say they do, isn't that the end of this matter?

Mr. Ransom: Precisely, Your Honor.

The Court: Let's ask counsel for the other side if they have any contention to the contrary.

You have just heard the statement of counsel made here concerning the cases. I have not read them, but that is counsel's version of them. I would like to ask the plaintiff if the cases do hold that when agreements are made between carriers for fixing rates, if that is the term to use, that, then, even though those agreements and rates have not been approved by the Maritime Commission that nevertheless the subject matter is still the primary exclusive jurisdiction of the Federal Maritime Commission.

Mr. Dunne: It is our position that the cases do not so hold.

The Court: That is what I wanted to hear.

Mr. Dunne: If we can get right down to what I think it is, it becomes comparatively simple.

Counsel very correctly told Your Honor with respect to rates of foreign carriers.

Now, Your Honor will have an occasion to look at the [fol. 68] Shipping Act. I call Your Honor's attention to the fact that in dealing with carriers by water it deals with two

classes of carriers; carriers in interstate commerce, or domestic carriers, and carriers in foreign commerce. The first section of the Act is very explicit in its definitions of carriers in foreign commerce and carriers in interstate commerce. The provisions of the Act are different in some respects with respect to carriers in foreign commerce and carriers in domestic commerce.

The Court: Would they be different in the connection that counsel has referred to these cases?

Mr. Dunne: Yes, Your Honor.

The Court: You, then, make a distinction between interstate commerce and foreign commerce?

Mr. Dunne: That is correct, because of certain provisions of the Act with respect to filing of tariffs by domestic carriers and the maintaining of reasonable rates by domestic carriers. There are provisions that apply to all of them about preferences and discrimination, but with respect to the rates of domestic carriers the scheme is very much like the scheme of the Interstate Commerce Act as to the carriers by railroad for the filing of tariffs and maintaining of reasonable rates. My recollection is that they charge only the rates that are filed.

The scheme as to rates as to foreign carriers is quite dif- [fol. 69] ferent. At least it was before the amendment of 1961. I want to call Your Honor's attention to the fact that this case arises before the 1961 amendment. The 1961 amendment changed the scheme of regulation as to foreign carriers, carriers in foreign commerce, to make it very much like that of railroads and like that for domestic carriers requiring that rates be filed and that the carriers collect neither anything more nor less and different from the filed rates. But until the 1961 amendment the scheme of this Act as to foreign carriers in foreign commerce was quite different as to rates.

The Court: Before you get into the distinction, let me ask you this question: With respect to interstate carriers, would counsel's version of the cases be substantially correct?

Mr. Dunne: Certainly would in certain respects as to rail carriers. One of the cases they rely on is the Teal case, common carriers by railroad. As far as I know, none of us have cited any case that touches on that exact point, even on domestic water carriers.

As to the rail carriers, the leading case there, as to the file and approved rates, is the Teal case.

The Court: In other words, counsel would be correct if he said that there are cases which hold, let us say, that interstate rail agreements and rates, even though not actually approved by the Maritime Commission, would remain [fol. 70] within the exclusive primary jurisdiction of the Commission.

Mr. Dunne: The Maritime Commission applies, of course, only to carriers by water.

You put a question as to rail carriers.

The Court: That is right. An analogy.

Mr. Dunne: The situation as to rail carriers is slightly complicated.

The Court: Well, let's stay away from the rail carriers.

Let me ask counsel this question. I am going to let you go your own way later on. I just want to see if we can narrow it down a little bit.

Mr. Ransom, will you state again your version of what these cases hold as you described them before.

I am not going to interrupt your train of thought here, Mr. Dunne. You can later on go into this in your own way. I am making it a little difficult, I guess, for you now.

Mr. Dunne: Your Honor is trying to see if we cannot meet head-on on this.

The Court: That is right.

Mr. Ransom: I think we can, Your Honor.

The Court: You state how we can, then. Generally there is an issue in these cases and sometimes it is a very circuitous route by which we try to get at those issues, and I am trying to see if we cannot cut through and see if there is [fol. 71] not an issue of fact or law, or whatever it is, between you people that at least you can agree on the issue.

Mr. Ransom: Your Honor, I do not think this question of the difference in how rates are made up, foreign or domestic, goes to the essence of this case at all. What Carnation is complaining about is that a rate was set by reason of agreements between these carriers and that the agreements were beyond the scope of agreements which had been approved. Therefore, they say the agreements by which these rates were set were unapproved, and being unapproved they are subject to the Antitrust Laws.

We say whether approved or not approved they are still subject to the Shipping Act and unapproved agreements making rates between foreign carriers is unlawful under the Shipping Act. The Shipping Act is the act which deals with that particular unlawfulness and that the Sherman Act to that extent is superseded.

Now, we also say, and this is an issue of fact, that the agreement which was approved was broad enough to include in fact the actions of these parties so that we will contend as a factual matter and a legal matter in the Commission when we are there, or if we have to, in this Court, that you do not ever really reach the question of approved or unapproved because we acted under an approved agreement.

Now, this is an issue where we say this is an issue of dis- [fol. 72] agreement. The further issue of disagreement is:

Assuming we are wrong about whether we are approved or disapproved, Mr. Dunne and Carnation Company say if that is the case you are at large under the Antitrust Laws. We say: no, the courts have decided that question and we are still under the Shipping Act and we are not under the Antitrust Laws.

The Court: All right. Let's get a little specific. What are those cases that you say have established that proposition?

Mr. Ransom: I would like to review them at some length.

The Court: Before we review them at length, and we probably will have to, do you know offhand which ones they are?

Mr. Ransom: Yes, Your Honor. It is United States Navigation Company against Cunard, which was decided in 1932; the Far East Conference against United States, de-

cided in 1952. Those are the two Supreme Court cases. Those deal with injunction proceedings.

The third case which settled the issue for all time, as far as we believe, is the American Union Transport against River Plate and Brazil Conference. That is a District Court decision of the District of New York, affirmed without even writing an opinion.

[fol. 73] The Court: Yes. That is the 1954 case.

Mr. Ransom: Yes.

The Court: Those are the three cases?

Mr. Ransom: Those are the three cases which we think this case should be decided on without the necessity of referring to any other cases, and those are the cases we say hit the issue right exactly between us.

The Court: Will you just, then, if you will, state for me as concisely as you can what those cases hold.

Mr. Ransom: I will endeavor to.

I should add this, if Your Honor please, that all these three cases concern themselves with not domestic water carriers but water carriers in foreign commerce that we are concerned with here.

The Court: You say these three cases deal with water carriers in foreign commerce as in this case

Mr. Ransom: As in this case.

Now, the first one, the Cunard case was a suit—Do you wish me to—

The Court: Let's start with the general and then get down to the details. I may not be able to understand it if you get too much detail. Tell me what you think they hold, just a plain garden-variety statement as to what you think they hold related to this case.

Mr. Ransom: These cases hold, if Your Honor please, [fol. 74] that where an agreement is entered into between carriers in foreign commerce of an antitrust, anticompetitive nature, a rate-making agreement, and the agreement has not either been submitted to or approved by the Federal Maritime Commission, the parties find their remedy, they must seek their remedy under the Shipping Act be-

cause the Shipping Act has for the steamship industry a scheme of regulations, a scheme of antitrust regulations, which applies as to that industry and which is the exclusive remedy for matters which come within or which relate to agreements of a shipping act section 15 type. I think that is exactly what they hold.

The Court: Let's put it this way: If they do hold that, I take it from your statement that they would be dispositive of this case because, as you have described them, they seem to be on all fours. Is that correct?

Mr. Ransom: Yes, Your Honor. I would say the only attempt that I can see, the only possibility of trying to distinguish these cases from our case, is that in the two Supreme Court cases an injunction was sought. In the first one it was sought by a private party to enjoin action under an unapproved agreement. In the second one the injunction was sought by the Government to enjoin action under an unapproved agreement entered into by carriers in foreign commerce. In neither case is there any indication or hint or suggestion that the fact that they are seeking an injunction has anything to do with the theory of the case.

[fol. 75] The reason that I cite to Your Honor the third case is that it dealt with treble damages. It was as Carnation here. It sought treble damages under the Antitrust Act. The Court there had the benefit of the opinion in the Cunard case and in the Far East case, and the Court there again dismissed the treble-damage action.

I should say, also, that of these cases there was a dissent in the Far East Conference case by Mr. Justice Douglas.

The Court: That is the last one?

Mr. Ransom: That is the second of the two Supreme Court cases.

Mr. Justice Douglas' dissent presented the same argument which Carnation has presented here in its brief; namely, if you do not have an approval you do not have an exception.

The Court discussed Mr. Justice Douglas' dissent and said: whether there is merit to it or not merit, we are bound

by the decision of the Supreme Court in the Cunard and the majority in the Far East. So this point was argued in that case, if Your Honor please.

I should also like to point out that the Cunard decision was a unanimous decision of all nine Justices, written by Mr. Justice Sutherland.

[fol. 76] The Court: I will have to read that myself.

Mr. Ransom: It is very unusual, Your Honor. It had on the Court at that time such quite well known Justices as Justice Holmes and Justice Brandeis.

In the Far East case, six out of the eight of the Supreme Court Justices were in favor of our position.

Stepping back a moment, in the Cunard case in the Second Circuit, Judge Augustus Hand wrote the opinion, which I think is a classic. All the arguments that could have been brought up were disposed of. Justice Learned Hand concurred with it.

The A.U.T. case, which I mentioned, was by Judge Edelstein in New York. When it got to the Second Circuit, Justices Clark, Medina and Dimock adopted the opinion, considering that the law was so well established that there was no need to write a further opinion.

Now, there are other cases besides these that follow then, but those three cases we say are definitely dispositive of this case.

The Court: Let's stop here for a minute.

Mr. Dunne, you have heard that version of the situation.

Statement by Mr. Dunne on Behalf of Plaintiff

Mr. Dunne: And you would like me to be just as short and concise and confine myself to a few main authorities as counsel from the other side.

[fol. 77] Now, our first proposition, and I do not understand it to be disputed directly, is this: Section 15 of the Shipping Act, actually providing that carriers in foreign commerce might enter into agreements to fix rates, should be lawful when approved by the Federal Maritime Commission.

Now, we are all going to refer to it as the Commission. There have been various agencies from time to time which have been charged with the administration of this Act.

They then should be lawful. It provided that to carry out unapproved agreements was unlawful. Then it said this:

> "Every agreement, modification, or cancellation lawful under this section . . . shall be excepted from the provisions"—

I am reading now from the Code.

> "of Sections 1-11 and 15 of Title 15 and amendments and Act supplementary thereto."

So it provided a method of getting an exemption from the antitrust statutes which were by approval by the Federal Maritime Commission.

On Page 6 of our brief we have cited cases. The last one which we have quoted is California against Federal Power Commission approving the holding in Maryland and Virginia, the Bar Association, and so forth, for the proposition that when Congress has provided a method for exemption [fol. 78] from the antitrust statutes you get an exemption only in the way provided for by Congress. That is one point upon which we have never really met anywhere.

Now, the second thing is this. Counsel calls your attention to the Cunard case and the Far East case, two decisions of the Supreme Court of the United States. We are going to submit to Your Honor that aside from this first point, the question which Your Honor eventually is going to decide is this: Is the case in hand controlled by Cunard or is the case in hand controlled by Great Northern against Merchants Elevator, 259 U.S. 285.

Now, there is a very significant thing about Great Northern against Merchants Elevator. It is cited and quoted at great length, and is the principal reliance of Justice Sutherland in the Cunard case. In due time when we argue this I will point out where Great Northern fits into this whole picture. I just say now it was Mr. Justice Sutherland's princi-

pal reliance, with a long quotation, for the explanation of the doctrine upon which he was relying in Cunard. When we get to the facts of this case, then I will point out to Your Honor what Great Northern against Merchants Elevator holds. Well, it is not exactly flippant, but in an endeavor in the closing brief to dispose of the Merchants Elevator case, it is pointed out somewhat solemnly that the case was decided in 1922.

[fol. 79] But in the United States against Western Pacific Railroad Company, 352 U.S. 59, Mr. Justice Harlan was very careful to point out that the Court reaffirmed and adhered to the distinction made in Great Northern against Merchants Elevator. So it is not a case, by any means, that has lost its vitality.

The Court: Let's call it the Great Northern case.

Mr. Dunne: Yes, Your Honor.

In due time we will enlarge on that, Your Honor.

Now, to go back to the two United States Supreme Court cases that counsel has called Your Honor's attention to, the Cunard case and the Far East Conference case, Mr. Chief Justice Warren in his landmark opinion in this field in United States against Radio Corporation of America, RCA, 358 U.S. 334, undertook some discussion of the United States Supreme Court decisions in this field and noticed both Cunard and Far East Conference. He cited them both but he cited them this way, as explained in Federal Maritime Board against Isbrandtsen Co., 356 U.S. 481—

The Court: In what? Federal Maritime—?

Mr. Dunne: Federal Maritime Board against Isbrandtsen Co., 356 U.S. 481.

When we come down to that case, when we compare on the one hand the case upon which Cunard relied, the Great Northern case, and its theory, and, then, on the other hand [fol. 80] look at the reaffirmation of the theory of Great Northern in Isbrandtsen, and Mr. Chief Justice Warren's citation of Cunard and Far East, but as explained in Isbrandtsen, I think we will come down to the nub of the issue in the case.

Your Honor wanted a very short statement of what we think are the few controlling authorities, although there are

other decisions of the Supreme Court that deal with various facets.

The Court: Let me ask you a few questions so I can get these in order. What was the date of Far East and Cunard, each of those cases? If you know.

Mr. King: Cunard was 1932, Your Honor, and Far East was 1952. Federal Maritime Board against Isbrandtsen was 1958.

Mr. Dunne: Great Northern is 259 U.S., and that would come before Cunard. About 1932, or so.

Mr. King: 1922.

The Court: U.S. versus Western Pacific, approximately?

Mr. Dunne: That is 1961 or so. U.S. against RCA, that is a little later. That is 358. That is about 1961 or '62. No. It is farther back than that.

The Court: Approximately.

Mr. Dunne: It is in the late fifties. These cases come after Far East Conference.

The Court: Your position is, then, that these cases that he cites, properly read, properly understood, are not ap- [fol. 81] plicable to this?

Mr. Dunne: Have nothing to do with this case. This is a simple overcharge case which falls squarely within Great Northern. There is not an administrative question in this case. It is a plain case of charging more than the only lawful rate and doing it because there was a conspiracy in violation of the antitrust statutes.

The Court: This is not an action, if there is such an action, provided under the Shipping Act to collect overcharges or recover overcharges, is it?

Mr. Dunne: Not under the Shipping Act, no, because the overcharge was unlawful under the antitrust statutes.

The Court: You mean arguendo.

Mr. Dunne: That is right. It is not remitted to the Shipping Act because the Shipping Act cannot give us the full remedy we are entitled to under Antitrust Acts.

The Court: What remedy does the Shipping Act give?

Mr. Dunne: It has a two-year limitation, whereas we have four under the antitrust. They give single damages; we get

treble in antitrust. If it is a jury trial, under the antitrust statutes the Government awards attorney fees whereas the Shipping Board Commission cannot give us anything.

The Court: The Shipping Act gives what, a two-year limited right to what?

Mr. Dunne: Reparations.

[fol. 82] The Court: To reparations. By a suit?

Mr. Dunne: By a proceeding before the Commission.

The Court: By a proceeding before the Commission.

Mr. Dunne: That is right.

The Court: Whereas by proceeding under the Antitrust Act you have more time, the right to a jury trial, and et cetera.

Mr. Dunne: In other words, we should point out that the remedy under the Shipping Act does not displace any remedy under the Antitrust Act assuming the same conduct violates both the Shipping Act and the Antitrust Act because it does not give the complete remedy and does not displace the other remedies.

The Court: Maybe this would be the time for you to tell me as briefly as you can, remembering that you can go into detail later to any extent you wish, just what you mean when you say that those cases referred to by Mr. Ransom, on which he has given his version, are distinguishable in the light of, let us say, Great Northern.

Mr. Dunne: Great Northern—

The Court: Before you do it, let me see if I can repeat what he said. He said that where agreements between carriers in foreign commerce have not been submitted to or approved by FMC, the parties must seek their remedies under the Shipping Act because it has a scheme of antitrust regu- [fol. 83] lation, and so forth, and that this is exclusive. He says that that in effect is what has been held by Far East, by Cunard, and followed by what we will call Brazil.

Mr. Ransom: American Union Transport versus River Plate and Brazil Conference.

The Court: Now, you must say and you say impliedly, that it really cannot hold exactly that.

Mr. Dunne: That is right.

The Court: What do these three cases hold, that is, Far East, Cunard, and the New York case, according to your version in the light of, let us say, Great Northern? Very briefly.

Mr. Dunne: Let me put Great Northern on its very lowest common terms. I have to go back just a little bit to do that.

Of course, the fountainhead about which we are all talking about is Mr. Chief Justice Fuller's opinion in the Texas versus Abiline Cotton Oil Company case. He held in that case that where there was a regulatory statute—in this case the Interstate Commerce Act, which had set up, to use a later expression of Mr. Chief Justice Warren, a pervasive scheme of regulation of the particular industry, that there were certain things that were committed to that Commission, it would act on certain matters, and where uniformity was essential to the whole regulatory scheme, and particu- [fol. 84] larly where the question upon which uniformity turns, was not a question of law which could be resolved for everybody by an appeal to the United States Supreme Court.

I am not relying on my imagination on this. The cases have later pointed that out.

But where it turned on question of fact—and as Your Honor knows, the courts on question of fact can only bind the parties immediately before them—that in such cases to determine who should act, then in aid of the general regulatory scheme, so that it should be applied generally, the regulatory commission should be permitted to act. That is the beginning of the primary jurisdiction doctrine.

Following that, there were a series of cases involving railroad rates in which it was held that these disputes over these rates amount to a question upon which there must be uniformity. Indeed, as Mr. Justice Brandeis pointed out in the Great Northern case, it may also require some expertise. Those cases had to go to the Commission first. Then came along Great Northern. Now, in Great Northern there was an overcharge, or so it was claimed, and the suit was

brought to collect that overcharge without first going to the Interstate Commerce Commission.

The Supreme Court of the United States looked at the matter and said: this is just a question of construction of a tariff, it is a question of law. A decision of the United [fol. 85] States Supreme Court will establish uniformity on this question of law. We can construe this tariff as well as anybody else can. Accordingly they held that that overcharge did not present an administrative question which must first go to the Interstate Commerce Commission but that the matter might be presented in the courts.

That case held that the primary jurisdiction doctrine did not require resort to the administrative agency before bringing suit in court, when there was no intricate question of fact, there was no question of upsetting a general regulatory scheme. It was a simple question of construction of a tariff. If the tariff was construed one way, it was an overcharge; if it was construed the other way, there was not an overcharge. Now, that has been compared with Cunard.

Going back some considerable time, water carriers, at least water carriers in foreign commerce, having organized conferences with approved conference rates, the agreement to fix rates was approved, and then they issued their rates. Under some of those approved agreements, these conferences set up the so-called dual rate structure. That was this kind of a scheme. They would set up the regular tariff rates and anybody who offered shipments to them, who ordered their service, could have it, paying those rates. But if the shipper would agree to ship only in conference bottoms, then he got a lower rate. This question of the validity of [fol. 86] this dual rates has been going on in the Commission and before the courts and even before the Congress, and finally was upset by the Isbrandtsen case, and they had to go to Congress for legislation to change that situation, and eventually did get legislation. They got a moratorium statute for awhile and then some more permanent legislation.

The United States Navigation brought an action under the antitrust statutes. It was not a conference member and it claimed that this agreement for this dual-rate structure was illegal under the Antitrust Laws, and so it brought an action under the Antitrust Laws only for an injunction, not for mere damages for past conduct, but an injunction which would be prospective in its operation. Now, there were two things that were peculiar about that.

The Court: Pardon me. What case are we talking about?

Mr. Dunne: Cunard. United States Navigation Company against Cunard Steamship Company. The question was when there is an attack on dual-rate structure and when the question is whether or not it is valid or whether or not it falls within the original approval of a conference agreement, you have got a question of such nature that you ought to go to the Federal Maritime Commission first and not sue first.

Now, remembering that the relief that was sought there was by way of injunction only, Judge Hand in the Court of [fol. 87] Appeals in the Second Circuit Court pointed out this peculiar thing that would happen. He said, suppose the Court went ahead and gave relief here and issued an injunction and then the dual-rate structure is submitted to the Federal Commission and be approved. It might be approved even while the case is pending out of court. In view of the fact that the only remedy sought was prospective in operation by way of an injunction.

Mr. Justice Sutherland who did not adopt that line of reasoning, or at least did not mention it in his opinion, but his general line of reasoning was this: this is a complicated industry. It is not within the general province of Courts to know about the details of an industry like the shipping industry and how a whole rate structure is constructed, and it is something upon which there should be uniformity and regularity.

Now, I do not want counsel on the other side to get up and tell me that I haven't accurately quoted the case because I do not pretend to quote the case. I am stating to Your

Honor my reading of the case and my interpretation of the case.

So Mr. Justice Sutherland, looking at the distinctions made in the Great Northern itself, said this kind of a case is a case for an administrative remedy first. Let me carry that on just very briefly, and if necessary we can now dis- [fol. 88] cuss the details of that. That was a suit by the United States Navigation Company, private suitor. Some time later in the Far East Conference case the United States itself made an attack on the dual-rate structure. Mr. Justice Frankfurter wrote the opinion in Far East Conference, and he said—the relief there being asked, of course, was prospective in operation only. He said, why, this is just like Cunard. This is asking for relief in the future, injunctive relief on this dual-rate structure; what difference whether the United States is the plaintiff or whether it is a private suitor; it is the same type of question. He said this is a primary question for the administrative agency.

Then comes up something that is extremely interesting in Far East Conference. He then said shall we dismiss or shall we retain this case until we see what the agency does.

Your Honor must remember that the agency here had the power to issue a cease and desist order which in effect is an injunction. So he said in this case we are going to dismiss because the Commission can give the United States all the relief to which it is entitled. Then he added a very significant sentence, which in effect is this, but if it does not, then the Government can bring a similar suit. There is only one way to read Mr. Justice Frankfurter's opinion in that case, and that is: we will dismiss, we won't pertain.

[fol. 89] No. 1, because the Government can get all the relief to which it is entitled and which it seeks before the Commission, but if it does not, then, there will be time enough for it to complain, and in that event it can bring a similar suit, which was a suit for injunctive relief under the Antitrust Laws.

Let me call Your Honor's attention to one other thing. I do not think there is any mistake about what we had to say about this in our brief but there has been an attempt to cast

a few stones at it. If Your Honor will read Mr. Justice Frankfurter's dissent in the Isbrandtsen case, if you will look at that dissent, it is an extremely important dissent because it is his reading of what the majority was doing so far as Cunard and their decision in Isbrandtsen.

This is a pretty long answer to a rather simple question which Your Honor put as to what do we think that Cunard holds. We think Cunard with its explanation in effect in Far East Conference where Mr. Justice Frankfurter points out that two remedies that the Court can have, either by retaining and waiting to see what the Commission is going to do, or either by dismissal, because if they do not get all the relief they want they can still bring an action.

Then, if you will read the majority opinion in the Isbrandtsen and the way it is highlighted by Mr. Justice Frankfurter's dissent, Your Honor will then see why it is we say that Cunard is not controlling here, but the case that is [fol. 90] controlling here is the case that Cunard relied on, which is Great Northern.

Your Honor, we are caught in a curious bind. One brief on the other side accuses us of being entirely too pedantic and introducing into this matter a heap of confusion. One of the other briefs on the other side said we are oversimplifying it. I do not know quite where we stand.

The Court: Plead guilty to both.

All right. Fine. We can hear from you later on this.

Mr. Dunne: Yes. As I understood Your Honor, you wanted me to present our central line of argument, what we have, and then these modifications, details, and peripheral decisions can be dealt with later.

The Court: That is right.

Mr. Ransom, you have now heard Mr. Dunne's comments. Who wants to be heard on that?

Argument by Mr. Turk on Behalf of Co-defendent, Far East Conference

Mr. Turk: Your Honor, that depends somewhat on whether you are ready to hear us present our arguments in

the order in which we had planned to make them or whether you wish—

The Court: I would like to hear without reference to your agenda, just to stand up here and tell me what is wrong with Mr. Dunne's picture.

Mr. Turk: Quite a few things in our view of it, Your Honor.

[fol. 91] In the first place, the Great Northern case was strictly a question of primary jurisdiction under the Interstate Commerce Act. There was no question there of the relationship between the Antitrust Laws and the Interstate Commerce Act. What has not been fully emphasized here is the manner in which the Supreme Court dealt with, first, the question of the relationship between the Antitrust Laws and the Shipping Act in both United States against Cunard and the Far East case, and then proceeded to decide where the proceedings should be tried.

Now, you will observe in reading United States Navigation against Cunard—

The Court: Let's call these by familiar names. Cunard, Far East, Great Northern. If you mention the defendants, sometimes I think you are talking about another case.

Mr. Turk: All right.

In Cunard the Court at the outset stated the nature of the charges and then it made a review of the provisions of the Shipping Act and it found that the provisions of the Shipping Act fully covered every detail of the conduct charged to be unlawful by the antitrust complaint, finding full remedial and substantive procedure in the Shipping Act. The Court did not say this is a technical matter and we will get rid of it. It said the Shipping Act pro tonto supersedes the [fol. 92] Antitrust Laws.

Then it had the question of what do we do with a Shipping Act case charging an unfiled agreement among common carriers by water.

It examined Section 15 of the Shipping Act which makes it unlawful to carry out an unfiled agreement among common carriers by water and said, well, there is no remedy un-

der Section 16 of the Clayton Act because that is as we have said before, it has been superseded, and even though this agreement that is charged in U.S. Navigation, its complaint looks pretty bad and looks horrible to a judge, it is entirely possible that on a full consideration of all the economic factors involved the then Shipping Board might approve it and we will not attempt to decide that in court, but following the primary jurisdiction doctrine, the question was referred to the Shipping Board.

At least the plaintiff was remitted to seek his remedy there.

The same question arose in Far East. Again, you had an antitrust complaint by the United States. Right at the outset Mr. Justice Frankfurter, who did write the majority opinion in this case, said we had a problem here of considering the relationship between the Antitrust Laws and the Shipping Act. U.S. Navigation against Cunard answers our problem and the Court proceeded on the theory that the [fol. 93] Antitrust Laws, again, have been superseded insofar as the agreements of common carriers by water are concerned.

Disagreeing with the District Judge in that case, Judge Frankfurter stated that the Attorney General had a right to bring a complaint before the Federal Maritime Board as it then was charging the very conduct which he was charging in his Antitrust complaint.

I think it must be clarified here what the gist of the grievance here is. Now, it may seem presumptuous of the defendants to tell the plaintiff what his gripe is, but still I think that we must analyze that in order to appreciate the application of supersession first, and then primary jurisdiction. There has been a lot of talk here about the power of the Federal Maritime Commission over its rates and agreements. The two are quite different.

Carriers in foreign commerce are authorized to initiate rates individually or pursuant to approved agreements and there is no requirement of approval of the individual rates, and until quite recently there was no provision for suspension and a determination as to reasonableness. But it is

equally true that interstate carriers do not have to get advance approval of their rates. They file their rates. After they have been on file after a stated period they become lawful rates unless the Commission on its own motion, Interstate Commerce Commission, or some other carrier or ship-[fol. 94] per brings a suspension proceeding and attacks the rates. So there is not quite all this great difference between ocean foreign commerce rates and domestic rail rates as it first may have appeared.

Secondly, and most important, Section 15 of the Shipping Act specifically requires the filing with the Commission of any agreement for the fixing of rates or the limiting or destroying of competition, pooling, allocation of traffic, et cetera. That is not limited to domestic commerce. It applies, or it at least had applied originally, with equal vigor to domestic or foreign commerce.

In 1940 the Water Carriers Act transferred jurisdiction over strictly interstate rates to the Interstate Commerce Commission and at the same time repealed the Shipping Act insofar as it applied to carriers who were going to be regulated thereafter by the Interstate Commerce Commission.

So far as having a domestic regulatory act here, the Shipping Act has the exclusive application to foreign commerce.

I think the air should be cleared on this subject. These agreements that are charged here are agreements of carriers of foreign commerce. Section 15 applies with full force to agreements of carriers in foreign commerce.

Now, Section 15, after prescribing the filing of these [fol. 95] agreements, tells the Commission that if it makes findings that these agreements are unjustly discriminatory among carriers, shippers or ports, or discriminate against American exporters as compared with their foreign competitors, something that Carnation refers to in its complaint, or are detrimental to the commerce of the United States or violate any other section of the Shipping Act, the Commission shall disapprove such agreement, otherwise it shall approve the agreement.

A further paragraph of Section 15 states that it is unlawful to carry out an agreement before or after approval. The further paragraph of Section 15 states that anybody who violates any provision of this section shall be liable to a civil penalty. It used to be a flat $1,000 a day. Since 1961 it is up to a thousand dollars for each day that the violation continues.

The reason I am bothering you with the details of what Section 15 describes as to the agreements which must be filed, what it says the Commission is entitled to do, the standards that are applied under the statute by the Commission and what the penalty is, is to give Your Honor a full appreciation of the fact that an agreement among common carriers by water in foreign commerce, free competition, is subject to the fullest kind of regulatory scheme under Section 15.

[fol. 96] The Court: What I am interested in right now is something just specifically to Mr. Dunne's statement which was generally to the effect that the Cunard and the Far East cases involved application for injunctive relief only, prospective relief, and that that some way or another distinguishes those cases from Great Northern which was an attempt to collect overcharges in the courts without going to the Commission and on which it was held that the issue involved only the question of law and that it was not an administrative question.

But before hearing from you on that, let's give this reporter a little recess.

(Recess taken.)

Mr. Turk: Your Honor, I will bring myself directly to the question you put before me before the recess; namely, where do we stand on this question of injunction versus treble damages. I think there are two answers to that. One is the easy one. In the cases under the Shipping Act or involving carriers subject to the Shipping Act regulations where complaints have been brought under the Sherman Act seeking treble damages, they have been dismissed.

Now, the leading case on that, of course, is the American Union Transport.

The Court: You are referring to some other case now?

Mr. Turk: No. I think you have that listed.

[fcl. 97] The Court: Is that the New York case? That is the Antitrust Act.

Mr. Turk: Yes.

The Court: As I understand it, that case was ordered dismissed on the authority of Far East and Cunard.

Mr. Turk: Exactly.

The Court: I am trying to find out, though, from you what you think is wrong with Mr. Dunne's attempt to distinguish these three cases by reference to other cases referred to in some of these decisions.

Mr. Turk: You mean, for example, his reference to the recent cases of California against Federal Power Commission?

The Court: No, I do not.

Mr. Turk: I do not—

The Court: Well, you heard his statement in answer to your version of what these cases hold.

Mr. Turk: You mean his reference to the Isbrandtsen decision?

The Court: Isbrandtsen, Great Northern . . . In other words, why do you think that Mr. Dunne has attempted to tell me to distinguish these three case?

Mr. Turk: That is a very long story.

The Court: Make it a short one.

Mr. Turk: Let's start out with the Isbrandtsen decision of 1958. Mr. Dunne says in his brief and in his argument [fol. 98] that that explains away U.S. Navigation and Far East Conference as authorities requiring the application of the supersession and primary jurisdiction doctrines. I think this involves misapprehension as to what went on between the majority and the dissent in the Isbrandtsen case.

In the first place, I think we must emphasize that Isbrandtsen was not an antitrust case and it was not even a primary jurisdiction case. It arose under the Review Act of 1950 to review an order of the Maritime Commission granting Section 15 approval to one of these dual-rate con-

tract systems. The case first came up in the District of Columbia Circuit and that Court held that these dual-rate systems are rendered illegal, per se, by Section 14 of the Shipping Act.

One of the questions presented to the Supreme Court was that was the Court below correct in holding that these are illegal proceedings.

Now, arguing there for the conference there involved, it was asserted that these earlier cases of Cunard and Far East Conference could not have been decided the way they were if the Court, the Supreme Court, had entertained the notion that these dual-rate systems were illegal per se. Someone on the Great Northern argued that if it were simple question of law the Court would not have had to defer to the administrative agency for its expertise; the Court would have said, well, maybe the Antitrust Laws do not apply but under Section 14 of the Shipping Act these sys-
[fol. 99] tems are so clearly illegal that we will grant an injunction under the Shipping Act.

Well, we were repulsed in that argument. The majority in the Isbrandtsen said: no, that this is not a correct interpretation of those earlier decisions; the primary jurisdiction doctrine applies to give the Court the benefit of a preliminary consideration by the expert agency which can compile a full factual record and develop all of the economic situations involved; then when the agency is done we still have the right to say whether their result was correct under the law.

It should be noted that the majority in the Isbrandtsen did not hold contract rate systems to be unlawful per se. They said that they are unlawful if they have certain attributes, if they are predatory, stifle competition, et cetera.

Mr. Justice Frankfurter in his dissent in Isbrandtsen almost quarreled with the good faith of the majority. He reviewed the history of these dual-rate systems and said they are always used to meet competition and to protect the carryings of conferences as against non-conference lines so that in effect the majority of today ruled them illegal per se

even though they do not come out and say it. He says that in so doing I think that they go contrary to the necessary [fol. 100] implication of Far East and U.S. Navigation against Cunard. This has nothing to do at all with the issue of supersession and the issue of primary jurisdiction in U.S. Navigation and Far East with which we are concerned with here.

Our position is that Isbrandtsen has nothing to do with the present case.

The Court: What about Great Northern?

Mr. Turk: Great Northern, again, as I believe I said before—if I did I think it bears repetition—was not an antitrust case. It was a case brought to recover a charge claimed to have been excessive under the tariff.

Now, in that connection I think it must be remembered that Section 9 of the Interstate Commerce Act gives persons who claim that they had been injured by a carrier subject to that act the right to proceed either before the Interstate Commerce Commission or before a Court so that there has had to evolve some philosophy of what type of question is more appropriate for administrative consideration and what type of question is appropriate for judicial decision.

The Court said all that is involved here is a reading and interpretation of a tariff provision. The Courts read contracts, wills, and statutes every day of the week; that is the kind of thing we can do; and as long as there is no technical question of the nature of the commodity and its use with which we are not familiar, we can decide the case as well as [fol. 101] the Commission.

The Court: Right. Suppose that the plaintiff here was bringing the suit in this court to collect a claim for excessive charges. Would he then be in the same position as Great Northern?

Mr. Turk: You mean under the Shipping Act? If he was bringing a suit—

The Court: Right here in this court.

Mr. Turk: Overcharge by water carrier?

The Court: Yes.

Mr. Turk: I don't think he would for this reason, that the Shipping Act does not contain any provision giving the option to sue either by a complaint for reparations to the Commission or—

The Court: Isn't that what was held in Great Northern?

Mr. Turk: That was the Interstate Commerce Act.

The Court: That is right.

Mr. Turk: That involved a railroad regulated under I.C.C.

I think that this would be an appropriate time to say that in considering a case under any other regulatory statute you have got to be careful to compare the regulatory scheme and the provisions as far as power to award reparations, the savings of remedies under other statutes, the savings of the [fol. 102] right to proceed in court before you can conclude that that case is authority for similar result under the Shipping Act.

The Court: At any rate, in Great Northern, it was held you could bring a suit in the court to collect what was claimed overcharges beyond the tariff.

Mr. Turk: I would not agree that is an overcharge case. As I understand it, Your Honor, under the Interstate Commerce Act an overcharge has technically become the terminology for a case where for used shoes the railroad has a rate of $2.00 a hundred pounds and it charged this shipper 2.10 a hundred pounds. The difference between the tariff rate and what he was charged was an overcharge.

The Court: That is what I understand to be an overcharge.

Mr. Turk. Yes. But I think the Great Northern involved the question of whether Commodity Q which good shippers ship properly should have been charged the rate for this kind of old shoes or whether it was actually used clothing. It was a question of which was the correct tariff provision to apply rather than strictly a charge of a rate higher than the rate clearly applicable.

The Court: Your position is, then, that as far as claimed overcharges by a water carrier under the Shipping Act pro-

visions is concerned that the aggrieved party could not come [fol. 103] into court here and collect that overcharge.

Mr. Turk: That is correct.

The Court: Because the situation is different from I.C.C.

Mr. Turk: There is no choice provided under the Shipping Act to proceed either before the Commission or the Court. The only provision is in Section 22 of the Shipping Act which gives the Commission the right to award reparations for violation of the Act.

Now, I do not concede at all that this is an overcharge case.

The Court: Well, the next question I was going to ask is this: This is a suit for treble damages by reason of alleged antitrust conspiracy. I suppose it is based upon the fact that charges were made which were arrived at by unapproved agreements.

Mr. Turk: That is the gravamen of it.

The Court: That may be the gist of it but it is not specifically an overcharge case.

Mr. Turk: No, it couldn't be an overcharge case.

The Court: I do not even know whether the damages would be the same, the elements would be quite the same. I am not sure.

Mr. Turk: I think Mr. Dunne would agree that he does not claim that Carnation was charged anything in excess of [fol. 104] what the Pacific Westbound tariff showed.

Mr. Dunne: I claim Carnation is charged exactly $2.50 a ton more than the only lawful tariff.

Mr. Turk: You haven't answered my question. I guess I can't get an agreement on it.

Mr. Dunne: You cannot get an agreement from me that any kind of conduct which purports to fix a tariff which is expressly declared to be illegal can fix a tariff. It is illegal conduct made expressly illegal by the Antitrust statutes as well as the Shipping Act.

Mr. Turk: I think what has been said makes it clear that the claim is for concerted action, whatever elevation of the rate may have resulted from concerted action.

It is our position, of course, that Section 15 is the substantive law and that Section 22 of the Shipping Act provides the remedy. Now, just because Section 22 does not provide for treble damages and lawyers' fees is, we submit, no basis for holding that the plaintiff is entitled to proceed under the Antitrust Laws. After all, if supersession means what it says, the theory is that Congress removed this segment of our industrial structure, these public servants, from antitrust and subjected them to an entirely different regulatory philosophy, and if it did provide a remedy of reparations for the injury suffered that was deliberate and it was deliberately different from the standard of damages [fol. 105] prescribed for commercial enterprises generally.

I think that to the extent there is talk of a difference between the prospective operation of an injunction and the retrospective operation of damages the interference with obedience to a coherent regulatory policy is equal. It is true that the injunction focuses our attention on the fact that the Court under antitrust may enjoin conduct which the Commission under Section 15 might well approve. But we of the industry are subject to equal pulling and hauling if we take the combined action which is conceivably approvable under Section 15 but for that action may be subjected to treble-damage suits under the Antitrust Laws we are again being compelled to serve two inconsistent masters if this type of suit is allowed to succeed.

I think that the representative of the Government may have more to say on that aspect of it, the degree to which the allowance of treble-damage suits under the Antitrust Laws would interfere with the Commission's activity.

Speaking for the industry, I think we would be equally saddled with two inconsistent philosophies of regulation if we are subject to regulation and, indeed, punishment by treble-damage suits under the Antitrust Laws and at the same time have to obey the dictates of the Shipping Act.

The Court: This is all on the assumption that these de- [fol. 106] fendants did not obey the provisions of the Shipping Act.

Mr. Turk: Yes. We are assuming, as I believe we must on a motion to dismiss, that what the Complaint says is so, but what we have done here has been done without approval.

The Court: Isn't that precisely what was done in Cunard?

Mr. Turk: It certainly was.

The Court: And Far East, and more specifically in the New York case.

Mr. Turk: Certainly. There is no question about it, that the same claim was made there, that because these agreements were not submitted and approved they are at large.

In the New York case the opinion I think is noteworthy because Judge Edelstein said that he is a little tempted by Mr. Justice Douglas' philosophy in his dissent in Far East but he said he felt he was precluded from following it because, after all, the majority said the other way around.

Mr. Ransom: I would like to comment briefly on the Great Northern situation of that case and what I understand Mr. Dunne is citing it for. It is my understanding that what he is saying that the Great Northern case says that the doctrine of primary jurisdiction or supersession does not apply if all you have is a simple issue of law which the Court can decide and you do not need to concern yourself with the expertise of the Commission and there is no problem, no [fol. 107] issue involved that has anything to do with this expertise.

Now, this, then, addresses itself to, really, what would the issues be in the event of a trial of the case; with what issues would the Court be concerned; would there be any issues which the Commission itself should first have a crack at and which you should take advantage of the fact that they are experts in the field; and that there should be a uniformity of regulation.

The Court: Are you saying that in this case this Court would have to necessarily determine whether or not these agreements referred to by Mr. Dunne were actually beyond the scope of any approval?

Argument by Mr. Ransom on Behalf of Defendant, Westbound Conference, et al.

Mr. Ransom: Yes. Not for the purpose of determining the motion to dismiss but for the purpose of trial. It is that to which I would like to address myself briefly, if I may.

This is where Mr. Dunne says his case is simple; he has a simple overcharge case. This is where we say the case is most complex when it comes to the Complaint itself.

The Court: In other words, you deny that these agreements which he is complaining of were in fact unapproved or beyond the scope of any Commission's approval. Is that right?

Mr. Ransom: Yes, Your Honor. What our position would be, which is the position actually already taken by the parties in a proceeding now before the Federal Maritime Com- [fol. 108] mission, which Government counsel will no doubt speak of—what our position would be on the trial of this case is that the agreement which was approved— First, the Westbound Conference has an agreement to approve rates and, then, the Far East Conference, represented by Mr. Turk, they have a rate-making section 15 agreement. Then these two groups decided that they were naturally competitive to one another. The cargo coming from the East Coast to the Philippines was in competition with cargo from the West Coast to the Philippines and they developed almost a rate war between the groups.

In order, then, to stabilize that situation they formed the two groups of carriers and entered into another agreement, a third agreement, this joint agreement, which is not unusual in the steamship industry. That agreement was Agreement 8200 and was appreved. That agreement by its very terms calls for subsequent meetings of the parties to make provision for the machinery for rate making.

Now, the position which the parties would take in the suit is that all they did, all of the activities which the Complaint alleges, were extracurricular, or outside of the agreement, were in fact actually approved by the agreement, or if not within the language, were implementations

of the agreement or were actions which do not need approval separately.

That is an issue, if Your Honor please, that has plagued the Federal Maritime Commission and its predecessors [fol. 109] since 1916. That is an issue which, just thumbing through the decisions this morning—I found eight cases in the Federal Maritime Commission and Federal Maritime Board decisions since 1955 on the question: when is it when parties have approved agreement that they are acting outside the agreement and when are they not. The Commission is attempting to determine uniform policy. This is the very type of issue for which the doctrine of primary jurisdiction was invented.

The Court: In other words, this joint agreement was approved.

Mr. Ransom: The joint agreement was approved.

The Court: Counsel apparently contends that the parties did something that was beyond the terms of it.

Mr. Ransom: Precisely.

The Court: It would seem, offhand, that if the Commission approved an agreement and the question came up as to whether or not actions of the parties were arguably within or without that agreement that the Commission should be the one to determine what it approved or did not approve. We will hear from Mr. Dunne on that.

Mr. Ransom: Exactly, Your Honor, and in just almost those words was Judge Pope's decision on March 6, just this March 6, 1963, on a case which did not involve the matter of primary jurisdiction. It is the Transpacific Freight [fol. 110] Conference of Japan against Federal Maritime Commission.

The Court: Transpacific Freight Conference of Japan against—

Mr. Ransom: Against Federal Maritime Commission.

The Court: Is that in the brief?

Mr. Ransom: Yes, it is, Your Honor. It is an unpublished decision and it is in the reply brief.

The Court: To what point?

Mr. Ransom: To the point—

The Court: Don't read the case. Tell me what the point of it is.

Mr. Ransom: The point I wish to make from this case is that involved in that case was a question of the construction of an agreement between carriers, an agreement which had been approved, and the Commission had determined what it thought, how far it thought that agreement would go, whether the action was within or without.

The Court in that case said that the Board itself or the Commission itself is the one that approved it and the Commission is the one, therefore, that ought to be able to have the opportunity to decide what it says. And it says that if the Commission does not have this discretion and power, it simply does not have the power to carry out the policies of the Act.

I state that case because it is exactly what Your Honor [fol. 111] has said, and that is our position, that this is not simple; this case involves many complicated issues.

Just one other issue that it does involve. The agreement says that the parties shall file their action taken at these subsequent meetings. They filed the actions, they filed a record of their actions at the meetings.

The Court: Pursuant to the original agreement.

Mr. Ransom: Pursuant to the original agreement.

Now, query: Did they file correct statements? This is an issue of fact. Did they file what in fact took place at the meetings? Having filed it, what they did file, and the Commission having accepted it, did the Commission by that approve that action or not approve it? What is the effect of the Commission's action?

That is another issue which has been a matter of contention before this Commission for a great number of years. These matters are simply matters which the Commission is going to have to make and is trying to make uniform policy.

The Court: All right. Let's see.

Mr. Ransom: We have not heard from the Government yet.

The Court: Well, we have to hear from the Government.

Argument by Mr. Hood on Behalf of Federal Maritime Commission

Mr. Hood: Your Honor, I think what Mr. Ransom, Mr. Turk and Mr. Dunne have all said really must have pretty well disposed of by this time that there is a reliance or [fol. 112] claim here of the statutes administered by the Commission. It is under 24B that we have moved for leave to intervene. The limit of our intervention is this motion to dismiss that we filed simultaneously with our petition for leave to intervene.

Also, Mr. Ransom and Mr. Turk have pretty well covered the field on the exclusive remedies of the Shipping Act. Therefore, my remarks must be brief.

First, I should like to point out, again, Your Honor, that Section 15 contains provision for penalites against persons who violate it. Those penalties are $1,000 a day; that Section 22 of the Shipping Act furnishes a procedure whereby a party injured by any violation of the Act can come to the Commission, file the Complaint, and following trial receive damages if such is approved.

Therefore, the Shipping Act unlike many regulatory statutes, does provide full relief both for the Government by way of injunction, as has been shown in Cunard and Far East, both by the way of monetary penalties collectible by the Government, as in the case of antitrust statutes, and, lastly, in the sense of damages collectible by persons who are injured by any violation of the statutes.

Perhaps I should point out, Your Honor, that as a representative of the Commission I am not here suggesting at all that the two defendants should be turned loose. It is our belief that they should be brought before the Commission. [fol. 113] The Commission has currently pending an investigation into the very behavior on a much broader scale than is alleged in the Complaint in this case.

As was mentioned a moment ago by Mr. Ransom, there exists currently a joint agreement between the two conferences. That agreement looks toward the establishment of rates and rules and regulations relating to rates for move-

ment of cargo from both the East Coast and the Pacific Coast to the Far East. There is contained in that agreement a clause that permits either of the conferences on a stated notice to take independent action if they feel their best interest demands that.

The proceeding that is currently before the Commission, Style Docket 872, was instituted to determine whether this agreement was a full and complete agreement between these conferences; are they carrying out something in addition to what they have received Commission approval for.

An additional issue in that proceeding is whether the Commission should continue its approval of that agreement.

The Court: Should what?

Mr. Hood: Continue its approval of that agreement. If at any time the Commission finds an agreement that has already been approved by it which is detrimental to the commerce or being carried out in a fashion that does not comport with the statutes the Commission may cancel the agreement or it may modify the agreement. So that also [fol. 114] becomes a part of Docket 872 before the Commission.

That leaves us in this position: The Commission must ultimately decide what the limit of the behavior is permitted by Agreement 8200. That case is currently pending the Examiner's decision. Following the Examiner's decision, the parties to that case, which includes Carnation, will be given an opportunity to file exceptions, and then the Commission must ultimately issue its decision.

The Court: When they decide, who reviews that?

Mr. Hood: That is reviewable by the United States Court of Appeals under the reviewable act of 1950.

So, again, we are not here asserting that the Commission is only capable of construing the Act but what we are saying is that in order that the Commission be given first opportunity to do that that the trial of the matter under the Shipping Act should be before the Commission. Whatever the Commission does is going to be reviewable in court.

If the instant litigation is permitted to proceed here, we run the risk of the Court and the Commission running head-

on. It may happen and it may not. I don't know. None of us can know. The Commission may construe the agreement in one fashion and the Court or a jury may take a different attitude. Therefore, if it is placed before the Commission, we will have what we believe to be a desirable uniformity.

Mr. Ransom mentioned the recent Ninth Circuit case [fol. 115] wherein the Court clearly indicated that the Commission is the proper form for the initial determination of what is permitted by an approved agreement.

In addition to that, I would cite to the Court a case that is also cited in our brief. That is Swift Company versus Federal Maritime Commission. In that instance the Commission overturned the construction placed upon the agreement by arbitrators. That was a Fifth Circuit Court case, and there the Court emphasized that the Commission has the duty to construe the agreement.

I believe, Your Honor, I have nothing further.

The Court: All right.

Do you want to close the matter up, Mr. Dunne?

Closing Argument by Mr. Dunne on Behalf of Plaintiff

Mr. Dunne: I do not know if I have everything quite in order here, but let me start with what was just said .

The suggestion was made here that if the Commission can proceed here, then there would be a desired uniformity. If the question is one of law, there will be uniformity when the Supreme Court of the United States determines that question of law. When this matter of uniformity has been suggested and the matter has been one of law, the Supreme Court has said if uniformity is desired, we can provide it. Those cases are cited in our brief, starting at page 24 and following.

The Court: What about this point in this case? It is [fol. 116] denied by the defendants that their actions were beyond the scope of an approval. As I understand it, they state that a so-called a third or joint agreement was ap-

proved by the Commission and it had some provisions in it which contemplated meetings between the parties and the filing of the reports thereof and that the parties met and did file reports thereof. Doesn't that present the type of question which the Commission would have to determine whether or not these meetings and what happened at these meetings would be within the purview of what they had approved, and, also, whether or not the Commission should continue this third joint agreement in effect or not?

Now, should I decide those questions?

Mr. Dunne: I will come to that, Your Honor. That is the reason I emphasized in our brief, quoted Mr. Justice Harlan's opinion in United States against Western Pacific, that each case must be taken on its own basis.

The reason I want the facts of this case squarely before Your Honor, the precise facts—and I do not say this unkindly and I do not say it in the sense of criticism—because this discussion this afternoon has developed somewhat informally—but I do not think Your Honor has been fairly informed as to what was approved and what was not approved, and I would like to call that very specifically to Your Honor's attention.

[fol. 117] The Court: I know. But is there an arguable point about it?

Mr. Dunne: No. Couldn't possibly be an arguable point, couldn't possibly be.

But if I may, I should like to pick up one or two of these other things. It was last suggested by counsel for the Commission that the Commission could review this first and could go over the facts and that if the Court acted they might come head-on. That is just exactly the reason I cited in our brief the very recent case of California against the Federal Power Commission. The Federal Power Commission had a matter before it which involved the same issue that is before the Court.

The question was who should go ahead first. Mr. Justice Douglas said the policy of the antitrust statutes has been entrusted to the Courts and the Courts are going to see that the policy of the antitrust statutes is vindicated; the Court

should not defer to the Commission but should decide the antitrust question.

Some of these recent cases have taken a lot of color out of the language of the earlier cases.

Now, going back a little, this Transpacific case that was recently decided by the Ninth Circuit has nothing to do with this here. It has an entirely different question of construction. It was a matter which was before the Commis- [fol. 118] sion. It does not have this question of primary jurisdiction or sole remedy in it at all. That is not involved.

Well, the other thing I called Your Honor's attention to is that counsel slipped from two things, from one to the other. They slip from arguing the primary jurisdiction doctrine and then they slip into sole remedy. There was a case on which— The Judge went so far to say that sole remedy was so far under the Shipping Act that the Government couldn't even prosecute criminally. That has been knocked in the head by the recent decision in January in the Panagra case. So what I am suggesting to Your Honor is that a lot of water has run over the dam since Cunard was decided and these are some things—

The Court: Which is the case that held the Government could not prosecute?

Mr. Dunne: Pan American World Airways against— I do not know whether it is against the CAB or not.

Mr. Ransom: It is cited in all the briefs, Your Honor.

The Court: All right.

Mr. Dunne: Just decided in January. Pan American World Airways against United States. I don't have the official citation.

The Court: That is all right. If it is in the briefs I will find it. That held that the Government could prosecute for—

[fol. 119] Mr. Dunne: It actually applies to the primary jurisdiction doctrine, and held that the Government could not proceed civilly. But the Court went way out of its way to point out that this was not in any way to restrict or to be taken as restricting the Department of Justice in proceeding criminally or in proceeding civilly in those areas

outside of what would be covered before the Commission. I do not undertake to quote, but the language is quoted in our brief.

Now, some remarks—before I get back to the question which I know is bothering Your Honor—it was said that Great Northern was not an antitrust case and the implication is, therefore, it has no bearing here. Well, if it does not have any bearing, why did Mr. Justice Sutherland in Cunard rest his decision on the language of Great Northern? The Supreme Court did not think Great Northern was so far away from the point involved in Cunard that it should not be cited; not only cited, but relied on it.

But there is more than that. There is a case that involved railroads in the antitrust statutes which is cited in our brief, and that is Georgia against the Pennsylvania Railroad, where it was held that where the conspiracy involved was beyond what the Interstate Commerce Commission could do the Courts could act, and the State of Georgia was permitted to maintain an action. Do not be misled by what is said in the briefs, quoting another case, because that case [fol. 120] would not be decided the same way today. It would not be in certain circumstances because since Georgia against Pennsylvania the Interstate Commerce Act—Section 5B I think it is, but I am not sure of it—has been amended to provide that combinations of rail carriers shall not violate the antitrust statutes if approved, which brings me to another point that was argued before you. I thought Mr. Turk was talking about that the industry was in a pathetic position if it was being tugged one way by the Commission and going to be tugged another way under the antitrust statutes.

Congress thought of that. Congress provided a very simple way so they would not be tugged in two directions. When they have an agreement, file it with the Commission and have it approved and the antitrust statutes have nothing to do with it.

The Court: Can't the Commission approve sort of an open agreement?

Mr. Dunne: Sure it could.

The Court: Calling for further action and reports.

Mr. Dunne: Yes, they could.

What has not been called to Your Honor's attention, we have pled this and we are not pleading in the dark because we had documentation when we drew this Complaint, documentation which, indeed, was developed in a proceeding which is now pending before the Commission. There was [fol. 121] this Agreement 8200—we have pleaded this in substance in our Complaint—entered into by the members of both the Pacific Westbound Conference and the Far East Conference. We had a copy of that agreement and we knew it had been submitted to the Commission, had been approved. This Complaint was drawn in the light of that approved agreement. That Agreement 8200 provided in Section 1 which, possibly, standing alone, might be subject to some question of interpretation although I think the question of construction which is a routine matter and a traditional matter of Courts, the Court can construe it as well as anybody else, that for a meeting of the members or the signatories of this Agreement 8200, it said:

> "The initial meeting shall make rules, not inconsistent with the provisions of this agreement, for the conduct of all meetings to be held hereunder, and for the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting."

Notice that, the machinery. Not for making the change itself, but for the machinery of making the change of any rates, rules and regulations adopted at the initial meeting [fol. 122] or at any subsequent meeting.

What they did, they went down and had their first meeting in Santa Barbara, the January following the approval of this meeting. Then they proceeded to enter into agreements and there were certain memoranda of those agreements which were known as Memoranda of Decisions.

Now, the substance of this matter, again, is pleaded. The agreements between these carriers were that they should set up a list of initiative items. Those items on the initiative list were items upon which either Conference, Pacific Westbound Conference or the Far East Conference, could act independently of the other in fixing rates, but that item as to rates not on the initiative list neither Conference should act without the concurrence of the other.

Now, let's test that. This is the thing that they tell Your Honor is necessary to go to a Commission and a body of experts and the Courts really don't know enough to decide. Testing that agreement, that was made at these meetings with the provision of Paragraph 2 of Agreement 8200.

I have read you the first part of it, from Paragraph 1, about the machinery for changing rates. This is Paragraph 2:

> "Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to [fol. 123] time amended to the contrary notwithstanding, if either group of Lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by air mail, and a summary of the facts which justify the changes on said short notice."

So here was an express provision expressly reserved to each of these two Conferences; the right of independent action to fix its own rates without the concurrence of the other Conference.

Now, that is just exactly contrary, just exactly opposite to what was agreed when they sat down and met. When they sat down and met they agreed that they would not independently change any rates if they were not on the initiative list.

Now, what do we allege in this Complaint, and we will prove it by their own minutes and by their own telegrams. They first raised the rates. We do not even have to go to the original tariffs to find out what was done. There is no [fol. 124] question of construction. They first raised the rates some time before January 1, 1957 for Pacific Westbound Conference carriers—this was by joint action, by concurrence—effective May 1, 1957 by $2.50 a ton. Now, there is no question of construction of a tariff. They just simply increased by $2.50. It does not take any expertise for a Court to look at the two tariffs and to see that the one, the newer one, is $2.50 a ton more than the first one. Now, that is all the question of fact that is there. It is as simple as that.

But that is not all. In November plaintiff Carnation applied to the Pacific Westbound Conference to reduce the tariff by two and a half a ton to the old rate, the rate which Pacific Westbound alone had lawfully fixed in 1951 and before this Agreement 8200 was entered into. Under approval of Agreement 57, Pacific Westbound Conference had the right and duty to fix the tariff for its member, and that became a lawful tariff. It had done so and fixed the tariff on evaporated milk in 1951.

Then, the next step is the Agreement 8200 which was approved, but approved by the Commission with the reservation in Paragraph 2 of this right of independent action to either one of these two Conferences. So there was never any approval of any agreement which deprived either of these Conferences of the right of independent action. Never. [fol. 125] It does not claim to be; if there had been they could come in here and we would be out of court in two minutes. Then the rate is increased by this side agreement by two and a half a ton.

In November 1957, Carnation asked them to go back to the old rate, the 1951 rate, which was fixed by Pacific Westbound Conference by itself. Pacific Westbound Conference determined that that should be done, that the rate should be reduced by two and a half a ton. It then applied to

Far East Conference to concur, operating under the side agreement.

When Far East Conference would not concur because of the side agreement for concurrence, a Pacific Westbound Conference withdrew its request and the rate was not reduced.

Stating it definitely, under Paragraph 2 of Agreement 8200, approved by the Commission, Pacific Westbound Conference had the right on a maximum of 78 hours notice to reduce that rate by two and a half a ton, just exactly as it had determined to do. It did not exercise that right. It did not exercise it because of the side agreement, never filed with the Commission for approval and never approved by the Commission.

Now, that is how simple this case is.

And when you talk about construction of contracts and policy in the industry, and all the rest, with all due deference, Your Honor, to counsel on the other side, that is plain nonsense. The facts are just as simple as I have told to Your Honor. There isn't an administrative question in [fol. 126] this case. This is a simple question of charging two and a half a ton more than the only rate that was ever lawfully fixed, which was the 1951 rate fixed by the Pacific Westbound Conference. That is why I say this is an overcharge case, because the increase of two and a half a ton was by reason of the side and unapproved agreement.

The refusal to reduce it on the request of Carnation and Pacific Westbound Conference, Pacific Westbound Conference requested concurrence of Far East Conference and it was refused, it was because of an illegal side agreement.

One of the things that Georgia against Pennsylvania Railroad Company held was that an agreement giving someone a veto power over the change of rates is an illegal agreement in violation of the antitrust statutes. That is exactly what happened in this case, and it is just as simple as that. That is the reason we say there is no administrative question here.

May I say just one other thing. There has been a good deal of talk about primary jurisdiction and then sliding

off to other matters. The only case that I know of—there is certainly no United States Supreme Court case on this—decided before the Isbrandtsen is the American Association case that was referred to Your Honor.

That was a case decided by the District Court, Southern District of New York.

The Court: Is this the 1954 case that they referred a [fol. 127] matter of law, is illegal per se, it is playfulness—that is the word he used—it is playfulness to apply the Far East Doctrine and the Cunard doctrine and make parties go to a Commission on a question that the Court itself is going to decide as a matter of law.

We suggest to Your Honor that when you have time to read the Complaint more carefully you will find that the only question, possible question of fact—and I am sure there is an Answer filed, there never will be a denial—is whether our statement in the Complaint here that the side agreement requiring concurrence was not approved. There cannot be the slightest doubt about the side agreement.

Counsel have gone outside of the Complaint and presented to Your Honor other matter. If there had been approval by the Commission of that side agreement it would be staring us in the face now. There is no such approval.

The only other question, then, is a pure question of law when Paragraph 2 of Agreement 8200 reserved to each of the two Conferences the right of independent action on 48 hours telegraph notice or 78 hours air mail notice that they were going to change rates, and that was not lived up to and was not adhered to because there was a side agreement that neither Conference would change its rates without the concurrence of the other. You have got the simplest kind of an antitrust issue. The Courts have been traditionally [fol. 128] handling this before there was any such thing as a Shipping Act or Commission. This is the importance of the McLean Trucking case, which is cited in our brief, along with Mr. Chief Justice Warren's opinion in U.S. against RCA, plus the fact that Commissions are not competent, are not competent, are not given the power to determine

antitrust issues as such. There is no case that I know of to the contrary.

They can exempt from the antitrust statutes under Section 15 of the Shipping Act if you proceed the way Congress said you are going to proceed. But there is nothing to permit the Commission to entertain antitrust issues as such.

I suggest that has been argued to you here today from beginning to end. Congress has said you can exempt, except, from the antitrust statutes by going to the Commission and getting approval of your agreement. Counsel on the other side are arguing to Your Honor exactly the same result follows even if you do not go to a Commission and get approval.

Colloquy

Mr. Ransom: You have been very patient, but could I take just one more second.

The Court: Yes, we can close this up. I will examine these briefs and issues in the case a little bit more closely and if I can rule on it, all right, and if I cannot I will ask for the parties to answer the question.

Mr. Ransom: I merely want to comment that I think Mr. Dunne has done a very good job of proving the point that [fol. 129] I had in mind in his long recital about how simple it is . I think it was quite difficult to follow and I think it shows it is quite complex.

Secondly, the latest expression of the Supreme Court on the whole subject is the Panagra case decided on January 14, 1963. That case, which applied the doctrine of primary jurisdiction to dismiss and sent back to the CAB a matter which had already gotten to the Supreme Court and which the CAB, in the first place, did not want, that reaffirmed as good, solid law the Cunard and the Far East by saying dismissal of antitrust suits where administrative remedy has suspended a judicial one is the usual course; see United States Navigation against Cunard SS Co., Far East Conference against United States. We, Your Honor, still stand on Far East, Cunard, and AUT.

Mr. Hood: The Georgia versus Pennsylvania case referred to by Mr. Dunne, did say that as to railroads there was some scope of antitrust principle. What he fails to mention is that the State of Georgia brought a Complaint seeking two remedies; one, treble damages under the Antitrust Laws and, two, an injunction. On the authority of the Teal case, the Supreme Court held that it was not entitled to maintain the treble-damage suit, but because the railroads, not protected by any I.C.C. approval at large under the Sherman Act, they allowed the injunction proceeding to stand.

[fol. 130] The Court: All right, gentlemen. Thank you very much.

I shall look into it a little further and if I can rule on it I will. If I can't, I will ask for help.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 131] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants.

ORDER GRANTING MOTION OF FEDERAL MARITIME COMMISSION TO INTERVENE—April 30, 1963

The Court, having reviewed the record and the briefs, desires further argument.

Mainly, the Court wishes to direct counsel's attention to the question, not heretofore raised or argued, whether the Shipping Act, 46 U.S.C. Sec. 821 (the remedy-reparation section) can be read as providing a remedy to plaintiff herein, bearing in mind that the only violation of the Shipping Act charged herein is the carrying out of an agreement prior to its approval by the Commission, and bearing in mind, further, that Section 821 provides reparation only for such injury, if any, as is *caused* by a violation of the Act. Can the particular violation here charged be considered the *cause* of any loss to plaintiff? Did plaintiff pay any more as a result of this violation than it would have paid if the violation had not occurred, i.e., if the rate change [fol. 132] agreement had been approved before being carried out? Was not the legal cause of any recoverable loss the violation of the Anti-Trust Act rather than the violation of the Shipping Act?

Counsel will arrange a hearing time with the Clerk. If not possible, the Court will fix a time.

The motion of the Federal Maritime Commission to intervene as a defendant under F.R.C.P. 24(b) is granted.

So Ordered.

Dated: April 30, 1963.

W. T. Sweigert, United States District Judge.

[fol. 133] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Before: Hon. William T. Sweigert, Judge.

Civil No. 41,153

CARNATION COMPANY, a corporation, Plaintiff,

vs.

PACIFIC WESTBOUND CONFERENCE, et al., Defendants.

Transcript of Further Hearing on Motion to Dismiss —June 11, 1963

[fol. 134]

APPEARANCES:

For the Plaintiff:

Messrs. Dunne, Bledsoe, Smith, Phelph, Cathcart & Johnson, 315 Montgomery Street, San Francisco, California, By: Arthur B. Dunne, Esquire, and James R. Baird, Jr., Esquire.

For the Defendant Westbound Conference and defendant carriers in that Conference:

Messrs. Lillick, Geary, Wheat, Adams & Charles, 311 California Street, San Francisco, California, By: Edward D. Ransom, Esquire, and William H. King, Esquire.

For the Defendant Far East Conference:

Elkan Turk, Jr., Esquire, 120 Broadway, New York 5, N. Y.

For the Defendant-Intervenor Federal Maritime Commission:

Robert B. Hood, Jr., Esquire, Federal Maritime Commission, Washington, D. C.

[fol. 135]

Tuesday, June 11, 1963
2:00 o'clock p.m.

The Clerk: Civil Action 41,153, Carnation Company versus Pacific Westbound Conference for further hearing on motion to dismiss.

STATEMENT BY THE COURT

The Court: Counsel, in this matter, as you recall, I sent out a memoranda, and subsequent to that memoranda, I have received further memoranda here from plaintiff and from, I think, all of the defendants, including the intervenor, Federal Maritime Commission.

Now, I have gone over those memoranda received subsequent to my notice in order to get the general purport of them. I have examined them carefully. I did examine all of the original briefs, and I did examine most of the important cases relied on by the various parties, and I proceeded to try and put the matter together to my own satisfaction, and it was then that I came to more or less of a standstill concerning an examination of the so-called Reparations Section of the Act.

I read that section carefully in the light of the three named Supreme Court cases, and then, because the particular matter that was bothering me had not been discussed at any length by counsel, I thought the best thing to do was to advise you of my problems so that you could have a hand in it. I didn't want to proceed on that basis without hearing from you.

[fol. 136] However, I don't expect you to reargue the whole case at this time by any means. I have gone over it pretty thoroughly. However, I do want to have your reac-

tion as briefly as you can give it to me in connection with the point that I asked for help upon.

Now, the Complaint here alleges that this agreement concerning change of tariff was not within the terms of the previously approved joint agreement 8200. Under this Complaint, as far as the Shipping Act is concerned, no alleged unjust or unfair method of practice discriminatory against others, as provided by Sections 815 and 816 is alleged, nor does it appear from the Complaint that there was any violation of the Shipping Act inherent in the agreement itself.

Under the Act, the defendants, as conference members, have the right to make such an agreement. The Act simply provides that it would be unlawful for the defendants to carry out that agreement prior to the approval by the Commission.

Further, under the Act, Section 814, the Commission was required to approve such an agreement and prevent undue discrimination or unfairness to others.

As far as the Shipping Act is concerned, the only unlawful act alleged against the defendants herein is the carrying out of the rate change agreement prior to its filing with and approval by the Federal Maritime Commission, as required by Section 814. For such a violation of [fol. 137] Section 814, the Act itself provides a specific penalty against the carrier of $1,000 for each day such violation continues, the penalty to be recovered by the United States in a civil action.

The question now arises whether Section 821, providing that any person may file with the Commission a complaint setting forth any violation of the Shipping Act and ask reparation for the injury, if any, caused thereby was available to plaintiff herein.

It will be noted that Cunard, noting the allegations there charging "a discriminatory dual-rate system constituted a direct and basic violation of the Shipping Act," and the Court went on to hold that a "remedy was afforded by the Shipping Act, Section 821, which," said the Court, "to that

extent supersedes the Antitrust Laws," and further that, "Mere failure to file the agreement there in question would not be ground for antitrust action, which depends upon the right to seek a remedy under Antitrust Law," a right, which we have seen, does not here exist, since the only alleged violation of the Shipping Act in the case at bar is the failure of the defendants to file and gain approval of the rate change agreement prior to carrying it out, and since Section 821 provides reparation only for such injury, if any, as is "caused by the particular violation," the further question arises whether the plaintiff herein could show that such particular violation was the cause of any loss of damage, to-wit, [fol. 138] not merely that it might have caused damage to him, but did not, but that by its very nature it couldn't have caused damage to him.

Certainly, the failure of the defendants to file or gain approval of the rate change agreement before carrying it out was not of itself a cause of loss to the plaintiff. The agreement between the Conference members concerning tariffs, as I read the cases, was not illegal itself under the Shipping Act, and as far as absence of Commission approval is concerned, plaintiff would have paid for shipping evaporated milk under the increased rate if approved by the Commission, exactly the same amount it claims to have paid under alleged unapproved rate change agreement.

It would seem that any recoverable expense or loss to the plaintiff here was caused not by the particular violation of Section 814 of the Shipping Act, but by a violation of the antitrust action, making any combination to fix or maintain prices or rates illegal, and giving in such case the right of action for damages.

Such an agreement between the Conference members, not having been filed with or approved by the Commission would not, and this is purely tentative for the purpose of provoking discussion, would apparently not be exempted from the antitrust action under Section 815 of the Shipping Act.

Cunard, as we read the case, did not hold that all agree-[fol. 139] ments between Conference members, whether filed

or approved or not were excepted from the provisions of the Antitrust Acts. It simply held that the Antitrust Acts were superseded to the extent that the Shipping Act provided a remedy for violations of the Act, or charges so related, with such violations to be, in effect, a component part of them.

Well, that's enough to indicate the particular question that I wanted to ask you to discuss, and you can proceed in your own way. My mind is completely open on this case. I intend to keep it so until I hear the matter.

We can hear either from the plaintiff, it seems to me, as to his reaction to whether he thinks that it has any merit or hasn't any merit. Then I'd like to hear from the Federal Maritime Commission intervenor to see what they think of it.

The statement that I made before, namely, that I don't expect you to reargue this case. In fact, I would suggest that you not do it. I will read carefully anything that you filed with me subsequent to the Notice sent out, but I'm rather intrigued with this point, and I'd like to see what the reaction is.

Statement by Mr. Dunne on Behalf of Plaintiff

Mr. Dunne: Let me say this first, Your Honor: I know of no direct authority that answers the question which Your Honor put, but in looking over the cases which have been cited in the memoranda on the other side—I won't say this [fol. 140] of all of the cases—but in the cases, particularly in the memorandum on behalf of the Pacific Westbound Conference, in two of them in particular to which Mr. Ransom called attention, the Swift case and the Kemper case, Mr. Ransom in his memorandum at page 11, line 21 very frankly concedes that those cases are not strictly in point, and very frankly concedes there something upon which Your Honor put his finger, and that was that in that case, not only was the agreement between the Conference members not approved, but in the action which was taken, there was an independent violation of the Shipping Act itself.

That is the character of the conduct, apart from the fact that there was a non-approved agreement, which constituted violations of the statute.

Now, I think you will find that the Smith—Muir-Smith case, which is also referred to, if you will look at it—

The Court: M-u-i-r?

Mr. Dunne: M-u-i-r hyphen Smith; which is cited in their memorandum, is a substantially different case, because there again there was a violation of an independent provision of the Shipping Act.

Now, in reading that case, Your Honor must bear in mind that that was an interstate shipment. Interstate shipments were involved and not foreign. And the provisions of the Shipping Act are somewhat different as to interstate business and as to foreign business.

[fol. 141] And there the violation was in charging a rate which was higher than the public rate. Again, a case of an independent violation.

Now, considerable time was spent in the memoranda on the American Union Transport case, and I think that case—

The Court: That's the New York case?

Mr. Dunne: That's the New York case. Against River Plate.

And again in the memorandum for Pacific Westbound Conference the matter is spelled out. The memoranda has given the full story of what happened in that case.

Now, the opinion of the District Court in that case indicated that there was something more involved in that case that a mere agreement among the carriers not to pay brokerage which was unapproved; and it indicated that there might then be involved in that case some application or interpretation of regulations of the Commission—whether it was the Commission or one of its predecessors, I refer to it as the Commission—aside from the agreement not to pay brokerage.

The matter was fully developed, and the plaintiff in that case then proceeded before the Commission. But then it was fully developed in the hearings that the profession of brokers, insofar as it affected foreign commerce in the cir-

cumstances of that case, was a business which was regulated, and under the regulations which applied to this regu-[fol. 142] lated business of brokerage, it was ultimately determined as a matter of application of those regulations, that the broker in no event was entitled to any brokerage.

What the cases—

And of course, if he was entitled in no event to anything, then it wouldn't have made any violation of the Antitrust Statute. Any different violation of the Shipping Act would be a matter of no consequence.

In somewhat reverse, I think that has some application to the questions that Your Honor put.

Now, let me go back a little. Your Honor, I have some notes here, but I want to be very careful to follow Your Honor's suggestion and not argue other aspects of the case, but address myself solely to the matter which Your Honor has called to our attention.

Notice this, and I don't say that this is conclusive of what Your Honor's determination should be, but the Commission itself takes a very peculiar position here. The facts that we are now discussing, the basis upon which this case is now being discussed before Your Honor on a motion to dismiss, are undisputed facts. There is no question of fact as to what did or did not happen. The Commission says, "Oh, well, we want to try this," but the Commission will not avow whether or not those undisputed facts constitute matters upon which, if they had been before the Commission, we would be entitled to reparations.

[fol. 143] The Far East Conference, it seems to me, is taking exactly the same position. They are saying, "If you get before the Commission, we are going to deny certain of these averments."

The Court: Well, this is a motion to dismiss your Complaint.

Mr. Dunne: Exactly.

The Court: It will have to be determined on the undisputed facts.

Mr. Dunne: On the undisputed facts, exactly, Your Honor.

And yet, we can't get an avow out of the Far East Conference that on these undisputed facts, we would have a remedy before the Commission.

So far as the Pacific Westbound Conference memorandum is concerned, they at some point indicated that perhaps we would have a remedy, but in the latter part of the memorandum they leave themselves an escape hatch on that, and again will not commit themselves.

But I think that that memorandum makes a very interesting attempt to characterize our case. It is suggested in that memorandum that we're really not complaining because this agreement is not approved, but we're really complaining that the rate that was charged was unreasonable.

Now, it seems to me—

[fol. 144] The Court: I didn't understand that to be the complaint, that the rate was unreasonable.

Mr. Dunne: Nor do I, Your Honor.

The Court: I think that the complaint is just a complaint that there was a combination to fix prices, and that it was not exempt from the Antitrust Laws.

Mr. Dunne: That's right, and that's all we claim.

The Court: If there were an issue here as to whether or not the rate fixed was reasonable or not, I suppose then remedy would be initially commissioned.

Mr. Dunne: Might very well be. And I would suppose as to interstate commerce, although I haven't gone into this and wouldn't want to commit myself, but as to interstate watergoing traffic, that might very well be the situation.

But what this does, though, suggests to us a hint of what the position would be if this matter were before the Commission. The position there would be that whatever the test may be under the Antitrust Statutes as to the fact of damage, and whatever the test under the Antitrust Statutes may be as to the extent of damage, under the Shipping Acts something more must be shown. It is not enough to show that there was an unfiled or filed and unapproved agreement, but it may very well be argued, and it might very well be the position that would be taken, that so far as the Shipping Act is concerned, something else must be shown

because as Your Honor pointed out, it well may be that [fol. 145] approved or unapproved, whether the parties had made this agreement or hadn't made this agreement, the rate would have been exactly the same; or as Mr. Ransom has pointed out, we would be out just as much money absent this unapproved agreement.

Now, we've got to get ourselves in a position where there is something illegal, so that we're not only out the money, in fact, have lost that amount of money, but it has become a recoverable loss.

Now, our position there is perfectly simple. It would be recoverable loss under the provisions of the Antitrust Statute, because the making of this agreement under the Antitrust Statutes is the violation.

The conspiracy—

The Court: And the statute gives the right to recover damages.

Mr. Dunne: And treble damages, too.

The Court: Well, treble damages, also.

Mr. Dunne: Now, in our memorandum, we pointed that out, but this is a separate matter, this question of whether or not there is an adequate remedy, if there is any remedy under the Shipping Act.

The Court: I'm not asking whether there's an adequate remedy, I'm asking whether within the meaning of that section, the so-called remedy or Reparations Section, there is [fol. 146] any remedy at all on the facts which you allege in your Complaint.

Mr. Dunne: Put it this way: If it can be said that we have been hurt by what the other side has characterized as—

The Court: You may have been hurt, but was your hurt caused by the violation of the Shipping Act? That's what I'm getting at.

Mr. Dunne: A purely technical violation of the Shipping Act. Is that the thing that gave us a recoverable position under the Shipping Act?

Now, counsel on the other side said this, and this may bear upon what Your Honor has in mind, they have said, with which we disagree, that it is enough if there is some remedy

in some circumstances under the Shipping Act. If there is, that it is not a matter of any consequence that if we got before the Commission we might not be able to prove our case.

The Court: Well, now, wait a minute. Stop right there. As far as that is concerned, I agree that there may be remedies provided under the statute. The man could show a violation, but in his particular case, his loss was either nominal or non-existent. But what I am talking about is this: If you bear in mind that the violation here, the only violation alleged here that I can find so far, is the violation of the statute, in re the failure to obtain commission approval be-[fol. 147] fore carrying out an agreement between them, which they could have made.

Mr. Dunne: That's right.

The Court: And which presumably would have been approved, so far as I can see.

Now, the question is, on that type of a violation, by its very nature, could there ever be a conceivable case in which that would cause damage to a person who pays the rate?

Mr. Dunne: Well, now, if—

The Court: And it's not a question of whether in one case you suffer damage, great or less damage by reason of some violation of an act, it is a question as to whether or not it's conceivable, having in mind the nature of this violation, that it could have caused the damage, as distinct from a cause of damage by reason of the statutory provisions of the Antitrust Act.

Mr. Dunne: But if Your Honor will let me finish my thought in that, they have suggested that if there is a remedy in some circumstances, then whether we can prove, bring ourselves within the remedy under that Act and prove our case, if we're proceeding under the Shipping Act and before the Commission, that's a matter of no consequence.

Now, what I say is this: But if proceeding under that Act, there are requirements for making a case under that Act, which we could not meet, which place upon us an addi-[fol. 148] tional burden which we would not have under the Antitrust Act, then we do not have under that statute the

superseding remedy, which I think is another way of saying what Your Honor has said.

Again, starting off on another tangent, let us suppose this sort of case: The United States Supreme Court against Pennsylvania Railroad Company pointed out that a combination of fixed prices, fixed tariffs was a violation of the Antitrust Statute. Even though it provided only for a veto, a prevention in the changing of rates, you would have a violation of Antitrust Statutes.

Now, let's assume that same set of facts, and I think that is what Your Honor has in mind. Let us assume that a rate had been fixed for carriage between the West Coast of the United States and the Philippines before the unapproved agreement had been made. The unapproved agreement was then made. The unapproved agreement put into the hands of the Far East Conference a veto power, upon the power of the Pacific Westbound Conference to change that rate. That agreement was not approved, but we continued to pay that rate. Could it be claimed that we had suffered damage by reason of a violation of the Shipping Act?

And I think Your Honor put your finger on it. We could not. The rate would be exactly the same.

In other words, I think, while nobody will expressly avow it, but so far as the actual cases are concerned, they have [fol. 149] shown something more than the unapproved agreement; they have shown something else that was a violation of the Act.

Now, unless we undertake the burden of showing something more than the making of an agreement, which was not approved as required by Section 15 of the Act, we haven't shown any damage by reason of the violation of the Act, and in order to do that, we would have to assume a burden, which is not put upon us under the Antitrust Statutes.

Now, I think that confining myself only strictly to the question which Your Honor put, and not getting into other cases of this matter which have been fully discussed elsewhere, the equivalence of remedy and the rest of it, that that is about as much light as I can shed on this matter at the moment for Your Honor, because I don't know of any authority on the subject that is of any assistance to us.

Statement by Mr. Hood on Behalf of Federal Maritime Commission

Mr. Hood: Robert B. Hood, Jr., for the Federal Maritime Commission.

Your Honor, Mr. Dunne has characterized the Commission's position as very, very peculiar. I believe he states that the facts here are not in dispute, therefore the Commission should rush forward with its interpretation of the law.

We have failed to do that, and I believe we are proper in our failure to do that simply because that we believe that a part of every man's day in court is the right to argue the [fol. 150] law. If this case ends up before the Commission, as we believe it should, then the Commission is going to be faced with arguments on both sides of this question.

Turning now to one of the matters that Your Honor mentioned in his opening remarks, and that is that there was no violation of the Shipping Act in the agreement itself, that is, other than the non-approval of the agreement, I believe you indicated that—

The Court: I said that the only violation which appeared on the face of the Complaint was that the Shipping Act was violated by putting it into effect before it had been approved.

Mr. Hood: Yes, sir.

Well, if I may turn then merely to the question that is stated in the order for further argument—

The Court: Pardon me. You may have all kinds of things that you can show by way of defense, that the situation was other than it appears to be, but for the time being, this motion is directed against his complaint, and I am asked to dismiss it solely on the ground of primary jurisdiction and I have to rule on the complaint for the present, anyway.

Mr. Hood: Yes, Your Honor. I'm not here to defend or prosecute anyone.

The Court: Correct.

Mr. Hood: I believe, Your Honor, that the question that [fol. 151] you have posed for reargument does contain a suggestion that the agreement would be approvable under the Shipping Act.

The Court: Well, I thought that under the provisions of the Act—I put it in here. You can correct me, because you are a specialist and I don't know much about this Act.

I think I said that under the Shipping Act it is required that the Commission approve agreements in the absence of something in connection with those agreements that establishes a discrimination or an unfairness to others.

Mr. Hood: Or detrimental to commerce, sir, is one of the other—

The Court: Well, there is a general clause tagged onto the end of it, something about commerce in general.

Mr. Hood: Yes, sir.

The Court: Well, all right. Go ahead.

Mr. Hood: The phrase "detriment to commerce" has been further amplified for Your Honor's information by the additional of "contrary to public interest" in a recent amendment. The Commission has stated in decisions since the recent amendment that "detriment to commerce" has always been construed to mean "contrary to public interest," that the two phrases mean substantially the same thing.

The Court: Well, all right. Go ahead.

Mr. Hood: What I wanted to point out to Your Honor is that under the language of Section 15 it is not necessary [fol. 152] that you show some violation of some other provision of the Act in order for the agreement to be unapprovable. There are other things that may cause an agreement to be unapprovable. We cannot, I believe, answer the question of whether this agreement would have been approved by the Commission or not here.

The Court: Well, what would be your thought on this matter—this Section—is it 814, the Reparations—?

Mr. Hood: That's the code section. 814 is Section 15, sir.

The Court: Yes.

Mr. Hood: 821 is Section 22, which is Reparations.

Perhaps I can state what I am driving at in a highly different fashion, sir.

The Cunard case and the Far East Conference both involve Section 15 agreements, so-called.

The Court in each instance indicated that it could not decide the approvability of those agreements.

The Court: That's right.

Mr. Hood: That was a matter that must first be decided by the Commission.

The Court: Well, I can understand those cases.

Mr. Hood: Ultimately in Isbrandtsen it was determined that the kind of agreement under review in Cunard and Far East was unlawful, but that decision or that determination [fol. 153] was made by the Court only after the agency itself had spoken.

The Court: Yes. I haven't had any particular difficulties with the Cunard case and so forth.

Mr. Hood: Well, Your Honor, with those questions arising in this case, as they must—

The Court: Why would those questions arise in this case as far as this complaint is concerned at the present time?

Mr. Hood: Well, if we are to assume that the agreement was approvable or was not approvable—

The Court: Well, suppose it was not approvable. Would that make any difference insofar as my question is concerned?

Mr. Hood: Whether the assumption must be made one way or the other makes the difference, Your Honor.

The Court: Make it either way, and then discuss it from either point of view. Suppose that we assume that this agreement need not necessarily have been approved, it might have been disapproved, then would that shed any light on the question that I am asking, which is, namely, whether under a statute which says that a man can go to the Commission to get reparations for any damages caused by a violation of the Act—

Mr. Hood: Yes, sir.

The Court: —could he in any case where all he had was the carrying into effect of an agreement prior to approval, could he in any event show damage caused by the violation [fol. 154] of the Act? That's what I'm trying to get light on.

Mr. Hood: Yes, sir.

The Court: Under any circumstances, just limiting it to that question for the present.

Mr. Hood: An unapproved behavior under an unapproved Section 15 agreement may be violative—

The Court: All the man has is the fact that these companies charged him a rate which had been fixed but not approved by the Commission.

Now, it seemed to me that any loss that he might claim couldn't be deemed to have been caused by a violation of the act, because the condition of the man in the last instance would have been the same as the condition of the man in the first, because if it had been approved he would have paid \$2.00 a ton; if it hadn't been approved he paid \$2.00 a ton.

Mr. Hood: Your Honor—

The Court: So he paid just as much one way or the other, and how could he then argue that he had been caused any loss caused by a violation of the Act? He might have claimed some loss on some other theory or some other basis, but how could he claim that his loss was caused by a violation of the Act?

Mr. Hood: Your Honor, that's again the question that we submit the Commission must determine first.

[fol. 155] The Court: Why? What is there to determine?

Mr. Hood: The construction of the Shipping Act.

The Court: That's a question of law.

Mr. Hood: Yes, sir.

The Court: Do they have to construe the law, too?

Mr. Hood: Ultimately in the Isbrandtsen-Supreme Court case, sir—

The Court: I never understood that absent some inextricable connection between the law and the fact, that the Commissions were to determine the law in the first instance. I think that primary jurisdiction is rested on the ground that they have very peculiar questions of fact and questions of quasi-factual judgment to make. But I never understood that it was purely a question of law that you would have to go to the Commission.

Mr. Hood: I would agree with Your Honor in that state-

ment, and I believe lawyers generally find themselves, or should find themselves capable of having an opinion as—

The Court: Well, whether they are or not, the theory is that the Court can decide it. It may decide them wrong, but in theory decides it right.

That's the only thing I'd like to find out from you. You're familiar with this Act. You're a specialist in it. How could this plaintiff here step into the Commission and say, "Here, I want reparations for a loss which has been caused by a [fol. 156] violation of this Act." So they say, "What violation?" And the only one he could point to, so far as his Complaint shows at the present time, is that these Conference members put into effect a rate which he paid, but they hadn't had it approved by the Commission. And how could he maintain that he had been caused loss by reason of violation of the Act, if that's all he had?

He may scream and say, "I've been caused loss by violation of the Antitrust Act," and a lot of other things, but how could he say, "I've been caused loss as a result of the violation of that Shipping Act"? That's what I am trying to find out.

Mr. Hood: Your Honor, I suggest that what he might say is, "But for."

The Court: "But for" what?

Mr. Hood: "But for the carrying out of this agreement, I would have paid a lesser rate." Certainly a man can make that argument—

The Court: No, because that—

Mr. Hood: —if we are to assume that the Commission—that he would have paid the same rate as the Commission approved—

The Court: His loss here was carrying it out before getting—carrying it into effect before getting approval. Now he has to show that he—that his loss was traceable to [fol. 157] the violation.

Now, the response comes, let us say, from the Commission, but if it had been approved by the Commission the day it was made, you would have paid exactly the same, so where's your loss?

Mr. Hood: Yes, Your Honor, but—

The Court: Maybe you have a point there. I'm not minimizing that.

Your answer is that his loss is caused by the violation because these people carried it out. They put it into effect without approval, and that in that sense it's being caused by the violation of the Act.

Mr. Hood: Your Honor, Section 15 does not merely prescribe the carrying out of agreements. The section requires agreements be immediately filed with the Commission, and the penalty provision of the section states that, "In a violation of any provision of this section, the penalty shall be" such and such. There is specific language. It says it's unlawful to carry out an unapproved agreement, but that's not the only thing that's unlawful under Section 15.

The Court: I seem to sense here that the answer may be that here is a man that's paying a dollar a ton. Now, they suddenly put in a rate of $2.00 a ton on him, and he pays it, but it's not approved by the Commission. It's carried out before approval of the Commission.

[fol. 158] Is it your judgment that he would have been caused loss due to the violation of the Act, let us say, to the extent of the increase?

Mr. Hood: Your Honor, perhaps I should apologize. I cannot answer except as spokesman for the Commission, and I cannot judge that because the Commission may find itself in a position of having to judge it, based upon the argument made to it—

The Court: Well, that's all right. That's all right.

Mr. Hood: I'm very sorry, but it makes it a little cumbersome to speak.

The Court: That's all right.

Mr. Hood: Your Honor, we continue to urge that it is unnecessary to reach this question here, that the other cases have avoided this. They have taken the language of the statute at face value, if you will, and have determined that it's a comprehensive measure for the regulation of the industry, and that a question such as this should be initially determined by the Commission.

We suggested in our latest memorandum that if Your Honor disagrees with our urging on that point, that stay might be the proper solution here; that if there is any substantial question on that point, and if Your Honor feels that it must be resolved one way or the other before this suit can [fol. 159] be disposed of, it might be most prudent to hold this suit in advance pending some conclusion by the Commission.

The Court: All right.

Statement of Mr. Turk on Behalf of Far East Conference

Mr. Turk: Elkan Turk, Jr., for the Far East Conference.

Your Honor, I think it is understandable that the Commission, being in the position of a potential judge, let's say, or another court, which may have to decide this case—

The Court: Well, you're not in that position.

Mr. Turk: I'm under no such disability. Of course, I'm under the disability of counsel who does not want to confess judgment for his clients either. But I think that we must concede this: I think there's been too little reference to actual language both of the Shipping Act and of the Complaint in this case, and I would beg your indulgence to refer to, let's call it the antepenultimate paragraph of Section 15, which starts—

The Court: Could you give me the other section?

Mr. Turk: Section 814 of the Code.

The Court: Give me the Code Section. That is the only thing I want.

Mr. Turk: It is Section 814 of the Code, the fourth paragraph, starting "All agreements"—

The Court: I haven't got it here right now.

Mr. Turk: Well, if I read it, perhaps—

[fol. 160] The Court: You just read it.

Mr. Turk: I think you have probably read it enough already so the language is familiar, but I think it is necessary to pin it to what this question of yours does present to us here.

> "All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval, or after disapproval, it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation."

Now, we submit that Section 15 creates three types of unlawfulness.

First, there's the command to file immediately;

Secondly, there is the requirement of approval; and

Thirdly, there's the injunction to party subject to this Act not to carry out agreements unless and until they are approved.

Now, it may be that if a group of carriers such as ours make an agreement and fail to file it, and just leave it lying there in the sun, they have subjected themselves to a penalty at the suit of the Government in a civil suit, to collect a thousand dollars a day, but they have not caused Carnation [fol. 161] Company or anybody else any injury.

But now, it seems to me, it is essential for us to bear that injunction not to carry out agreements prior to approval in mind in reading what the essential allegations of this Complaint are, and paragraph 22 thereof says:

> "Before May, 1957, defendants acting as alleged in paragraph 18 above,"—

And paragraph 18 is that horrible conspiracy combination and secret plot,—

> "agreed that the rates for transportation by water by members of defendant P.W.C. from Pacific Coast ports of the United States to the Philippine Islands for evaporated milk, should be increased by $2.50 per ton and that defendant P.W.C., pretending to act agreeably to the provisions of said Agreement No. 57, should state and circulate said increase as effective May 1, 1957."

That's its own agreement and not the joint agreement, "should state and circulate said increase as effective May 1, 1957."

And continuing in paragraph 23:

> "Before May 1, 1957, and effective as of May 1, 1957, P.W.C. did, in fact, so announce and circulate said in- [fol. 162] crease in said rates, and over plaintiff's protest defendants put into effect and applied said increased rates. In so doing defendants falsely pretended that P.W.C. was acting lawfully and agreeable to said Agreement No. 57. In truth and in fact, in so doing, defendants were acting agreeably and pursuant to said unlawful combination,"

et cetera.

I think there's no question here that there's no nice abstract problem of whether we just ignored some petty formality under Section 15 of filing and getting approval.

The Court: All you're reading from are allegations which are part and parcel of an antitrust action.

Mr. Turk: They are part and parcel of an antitrust action, but as I understand Your Honor's question, the question is whether the antitrust aspect is dispelled, superseded because of the Shipping Act, and it's essential in Your Honor's mind, as we understand the question, to determine whether those same allegations would entitle this plaintiff to relief under the Shipping Act.

The Court: The very question here is whether or not these companies are exempt or not exempt from antitrust.

Mr. Turk: That's right. And what I'm trying to do, Your [fol. 163] Honor, is take this injunction of unlawfulness under Section 15—

The Court: The only thing he alleges in his Complaint that was unlawful under the Shipping Act is that they carried on the agreement without approval.

Mr. Turk: Yes.

The Court: All right.

Mr. Turk: I just wanted to make—

The Court: The rest of it is all antitrust.

Mr. Turk: I just wanted to make sure that it's understood that the gravamen of the Complaint is not some abstract question of a failure to file, which could have been rectified and therefore made no difference.

The Court: It's an antitrust complaint.

Mr. Turk: But it's also a Shipping Act complaint, because the Shipping Act covers the substance of this charge, the carrying out of an agreement which was not filed and not approved.

And now we come to the proposition which the defendants assert, that if Carnation can prove that these rates were increased, or that one group of the lines vetoed a decrease by the other, pursuant to an agreement which was unlawful, because it was not filed and approved, then Carnation could and has established a right to reparation under Section 22, Section 821 of the Code.

[fol. 164] The Court: What would be the conceivable damages they could have suffered?

It may be that this is the answer to the question that, as I put it a minute ago, if Conference members put a rate into effect of say a dollar a ton, and then they put a new rate into effect of two dollars a ton, but don't get permission, then the shipper can go to the Commission and tell a story in those terms, and say, "I want a dollar a ton back for the period of time during which they put the increase into effect without approval of the Commission."

Now, that may be the answer, but what I was intrigued with is the idea that in that situation, the dollar a ton increase could not be said to have been damage caused by the particular violation involved, because if it had been approved, he'd have made the same any way, and there may be some circular reason involved in it.

Mr. Turk: I believe there is because—

The Court: Well, I'm asking for you to pry it out.

Mr. Turk: All right. Let me suggest this to Your Honor: That when you assume approvability and say that therefore it would have been lawful, I think that you have to make a comparable assumption when you test the antitrust allega-

tion and assume no one unlawfulness under the Antitrust Laws.

The essence of unlawfulness here, whether the agreement [fol. 165] was susceptible of approval or not, is the fact that it was not approved, and whether it was—

The Court: If that's a violation, there's no doubt about it.

Mr. Turk: Yes. And once it's established that an agreement of the sort described in Section 15—and this is clearly that it is an agreement on rates—has been carried out without filing and approval, Section 15 unambiguously says that that is unlawful.

The Court: The case that I put to you, what would be the remedy of the shipper?

Mr. Turk: The remedy of the shipper would be, if he establishes that he had transported 100,000 cases of evaporated milk in this trade and paid a dollar or more per case, unless there is some mitigating factors—

The Court: Leave out all the factors. Take the case that I put: He's paying $1.00 a ton; they raise the rate, the Conference raises the rate to $2.00 a ton, but they don't get it approved and he pays it for a year, what does he do when he goes to the Commission?

Mr. Turk: If I was his attorney, I would ask for reparation in the amount of a dollar for every ton that I had shipped, and perhaps more. I think that it does depend, just as it would in an antitrust case, on whether his damage is the exact equivalent of this enhancement of the price.

[fol. 166] Now, if he were able to pass on to his customers that dollar—

The Court: Maybe that's the answer.

Mr. Turk: Yes. I think that the important thing here is that there is no necessity to prove any other unlawfulness under any other section of the Shipping Act.

And if you examine the A.U.T., the American Union Transport case, there was some reference to—

The Court: Well, if he has a remedy for that violation, then of course, your argument is that since he has the remedy, he's got to go to the Commission, and to the extent that he has a remedy, the Antitrust Laws—

Mr. Turk: Are superseded.

The Court: —are superseded. Those are the cases.

Mr. Turk: That's exactly—

The Court: I'm just trying to get the answer to the very small question that I put to you, namely, whether there was some invalidity to the point that I raised.

Mr. Turk: We read it as a question and not as a point.

In answering it, I say to Your Honor, his Complaint does allege a violation of Section 15 for which a reparation may be awarded.

The Court: Yes, and you say that—

Mr. Turk: And that the violation consists of the carrying [fol. 167] out of this agreement by the addition of $2.50 per ton to the evaporated milk rate, and to the extent that Carnation was damaged by that, he can get reparation from the Federal Maritime Commission.

The Court: Yes. And you would say that damage which he is getting, and that would be the only measure that could come from a violation at this particular time, that that would deemed to be damage caused by the violation of the Act?

Mr. Turk: Clearly.

The Court: Well, maybe you're right. Caused by the violation of the Act, even though it be assumed that if the Act had been complied with in this respect, he would have paid the same thing.

Mr. Turk: Exactly.

The Court: Well, maybe that's the answer.

Mr. Turk: There's one other question that was under discussion with Mr. Hood, as to what there might be for determination by the Commission here, where we get before the Commission on a contested set of facts—

The Court: Then you're getting away ahead of me. All I've got is the Complaint here.

Mr. Turk: Yes. Well, I thought there was a colloquy between you and Mr. Hood as to what questions might be opened before—

The Court: I don't know. There might be a lot of ques- [fol. 168] tions opened there, but so far as I am concerned

with now, I'm dealing with the Complaint in the light of the point that, on what's pleaded here, primary jurisdiction if the Commission takes over.

Mr. Turk: We certainly would contend that it would be for the Commission to decide whether we are correct in stating that everything that our clients have done is within the scope of approval of that joint agreement that was approved. Now, that I think is basically an administrative question, to determine whether the agreement, which they did approve, enveloped all of these transactions.

Colloquy

The Court: All right.

Mr. Turk: Thank you, Your Honor.

Mr. Ransom: Your Honor, I think that the question that you have posed was solved. I'd like to say this, that I can understand Mr. Hood's position, representing as counsel for the Commission, because I was in that spot. I was the general counsel of the Commission for two years. And I would say that I as such an official might have had that, but I no longer do have any problem like that, and as far as I am concerned, unequivocably, unequivocably, Your Honor, that there would be reparations granted for a violation of Section 15, as for the sole violation being acting and carrying out an unapproved agreement. And I say that because I think the authorities which we cited to Your Honor support [fol. 169] me in that, both on what the Commissions have had and what the Court has said. In every case where there is a Section 15 claimed of a violation for Section 15, for carrying out an unapproved agreement, the same question can be posed.

If they had gone to the Commission and they had gotten approval, would not the parties have been in exactly the same position damage-wise? But would they then have a violation or a recoverable loss?

And every time there's ever had any kind of a Section 15 problem along these lines, that same question would be answered—would be posed, and the answer clearly is that the carrying out, the undertaking of this agreement, which

created the rate without getting approval, is the thing which caused the damage, and which gives the right to reparations without anything else. And I think—and I'm not going to take a great deal of your time. I think you have had it as far as the number of people, but I want to say that it is true that the Commission in deciding those kind of cases, has not actually discussed the problem which Your Honor has raised in their cases, but the mere fact that the Court and the Commission, without hesitation indicate that reparations are available for a Section 15 violation, really answers the problem. And I think—

The Court: Administratively the answer would be that they would be awarded the difference between what they [fol. 170] had paid and what they had been paying before the increase, if the increase was carried out without approval of the Commission. Is that the formula?

Mr. Ransom: Yes. And I think—the A.U.T. case, which is a bellwether for us from the very beginning—

The Court: What's the A.U.T. case?

Mr. Ransom: That's the American Union Transport case, the treble-damage case, the New York case, which in answer to Your Honor's question, we have gone—we've carried on further.

You will recall we carried it from the District Court up to the Circuit Court on the question as to whether or not you can be in court for treble damages if you haven't—if you are talking about the violation of an unapproved agreement. And they answered that, "No, you can't be in court." Then they sent it back to the Federal Maritime Board, and the first examiner of the Federal Maritime Board handled the case. And what the man was claiming was that here was an agreement that wasn't approved. They said, "We're not going to pay brokerage." And he says, "That's an illegal agreement, because it was not approved."

The examiner gave him reparations, and the Commission did not give him reparations, only because they said, "He hasn't earned it in the first place."

Now, he hasn't proven his damage, no matter what, in [fol. 171] any court. He couldn't prove his damage, because he didn't do the job of being the broker.

And neither the Court nor the Commission at any time—

The Court: He didn't buy the milk under the new rate, is that it?

Mr. Ransom: Yes.

And I would say that first of all, Mr. Dunne acknowledged he found no cases on this. We found, I think, five cases on it, which we have in our memorandum, precisely on the point of Your Honor's question, and in the first section of our memorandum, the A.U.T. case, the Kempner case and the Swift case, which I was frank to say involved violations other than Section 15, and in which no one said, "Well, if he had had it approved, he wouldn't have been damaged, and therefore he wouldn't have any reparations under Section 15 for carrying on unapproved agreements."

The Commission itself, from another case we have cited in here involving the Pacific Coast European Conference, stated unequivocably that a violation of Section 15 created a remedy under Section 22, and the case—the Muir-Smith case, which Mr. Dunne referred to—I do not say that that is a Section 15 case; it doesn't involve Section 15—but it involves the same situation.

They had a hearing on this rate. They found the rate was [fol. 172] perfectly reasonable, perfectly lawful, except that it hadn't technically complied with the rate figure requirements relating to a minimum.

The Commission nevertheless said, "You are entitled to your award of reparations for the time that rate was in effect, because you have violated the statute in a violation."

I think the question has been answered by the Commission and the Court, Your Honor.

The Court: I think that on that particular point, I may have been a little over analytical perhaps on the point. However, if there is a remedy, Mr. Dunne still makes the point that it would be an adequate one, and none of the usual factors have the primary jurisdiction of doctrine present. And I will go into those very carefully, but unless somebody else has something to add, I think we have covered the matter.

Would you care to comment?

Mr. Dunne: I only want to make one comment, Your Honor, and that is again, the American Union Transport case to which Mr. Ransome just referred.

The reason that case presented difficulties for the Court was—the reasons that no brokerage had been earned, were to be found in the regulation of the steamship brokerage business, by the Commission.

So that there the question of whether or not he had or he had not earned his brokerage turned on the administrative [fol. 173] question. That's not in our case.

I don't want to enlarge on this. The other cases—I mean, Mr. Ransome quite correctly said the Swift case involved none of the violations. They are very easily distinguishable.

Mr. Ransom: Do you want comment on that?

The Court: If you don't, you will fall off that chair.

Mr. Ransom: Thank you. I merely want to say on that, Your Honor, that the reason the man was not entitled to brokerage is because he hadn't secured the cargo for the ship, and that happened to be language used in a prior docket of the Commission.

But it was so obvious. I mean, it's a fundamental principle about earning brokerage, that that regulation, if it is a regulation, because the Commission formally decides it, has nothing whatever to do with the man having to prove something other than Section 15 to get reparations.

The Court: All right. I will check over your recent memos, and I'm sorry to have kept you all afternoon, but it won't do any harm.

Mr. Ransom: Thank you very much, Your Honor.

[fol. 174] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants.

MEMORANDUM OF OPINION—June 20, 1963

After careful consideration of the record and the briefs the Court has come to the following conclusions:

The Shipping Act, 46 USC Sec. 821, provides a remedy for any violation of the Act.

To carry out a rate agreement between carriers before approval of the Commission is an unlawful violation of the Act (46 USC Sec. 814).

This issue is tendered by plaintiff's complaint.

The Supreme Court has held that the antitrust laws are superseded to the extent that the Shipping Act provides a remedy. *United States Navigation Co.* v. *Cunard*, 284 U.S. 474 (1931); *Far East Conference* v. *United States*, 342 U.S. 570 (1951); See also *American Union Transport* v. *River* [fol. 175] *Plate*, 126 F. Supp. 91 (S.D.N.Y. 1954), aff'd 222 F. 2d 369 (2d Cir. 1955); *Rivoli* v. *New York*, 167 F. Supp. 940, 943 (S.D.N.Y. 1956); *United States* v. *Alaska SS Co.*, 110 F. Supp. 104 (W.D. Wash. 1952).

Although plaintiff contends that these cases are narrower in their holding and effect than they seem to indicate, this

Court is of the opinion that these decisions of the Supreme Court and decisions of other courts following them, are well-established precedents for applying the doctrine of exclusive primary jurisdiction to the Shipping Act in the present case.

The motions to dismiss, therefore, are granted and moving parties will prepare, serve and present an order accordingly.

Dated: June 20th, 1963.

W. T. Sweigert, United States District Judge.

[fol. 176] [File endorsement omitted]

In the United States District Court
For the Northern District of California
Southern Division
Civil No. 41153

Carnation Company, a corporation, Plaintiff,

v.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, et al., Defendants,

and

The Federal Maritime Commission,
Defendant-Intervener.

Order and Judgment of Dismissal—June 25, 1963

The defendants' and intervener Federal Maritime Commission's Motions to Dismiss the Complaint on jurisdic- [fol. 177] tional grounds having been heard; briefs having been filed on behalf of plaintiff, defendants and intervener;

oral argument having been heard on April 8 and again on June 11, 1963; the cause having been taken under submission; and the Court having filed herein a Memorandum of Opinion granting said Motions to Dismiss on the ground that primary jurisdiction of the action is in the Federal Maritime Commission:

It Is Ordered, Adjudged and Decreed that plaintiff's action be, and the same is hereby dismissed.

Dated this 25 day of June, 1963.

George B. Harris, United States District Judge.

Approved as to form as provided in Rule 46:

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Bledsoe, Smith, Phelps, Cathcart & Johnson, By: Arthur B. Dunne, Attorneys for Plaintiff, Carnation Company.

[fol. 178] [File endorsement omitted]

In the United States District Court
For the Northern District of California
Southern Division
Civil Action No. 41153

Carnation Company, a corporation, Plaintiff,

v.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, et al., Defendants,

and

The Federal Maritime Commission,
Defendant-Intervener.

Notice of Appeal—Filed July 18, 1963

Notice Is Hereby Given that Carnation Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order and final judgment of dismissal herein, dismissing the above entitled action, made and signed June 25 1963, filed herein on June 26, 1963, and entered in this action on June 27, 1963.

Arthur B. Dunne, Wallace R. Peck, James R. Baird [fol. 179] Jr., William H. Birnie, Dunne, Bledsoe Smith, Phelps, Cathcart & Johnson (formerly Dunne, Dunne & Phelps), By Arthur B. Dunne, Attorneys for plaintiff-appellant, Carnation Company, a corporation, 333 Montgomery Street, San Francisco 4, California.

[fol. 180] Bond on appeal for $250.00 filed July 18, 1963 (omitted in printing).

[fol. 181] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil Action No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants,

and

THE FEDERAL MARITIME COMMISSION, Defendant-Intervener.

STATEMENT OF POINTS ON WHICH PLAINTIFF INTENDS TO RELY ON APPEAL (FRCP RULE 75(d)) AND DESIGNATION OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL (FRCP RULE 75(a))—Filed July 19, 1963

Whereas, the plaintiff herein, Carnation Company, a corporation, has appealed to the United States Court of Appeals for the Ninth Circuit from the order and judgment made herein on June 25, 1963, filed herein on June 26, 1963, and entered herein on June 27, 1963, dismissing the above entitled action, now, said appealing plaintiff, makes its concise statement of the points upon which it intends to [fol. 182] rely on the appeal, and designates the portion of

the record, proceedings and evidence to be contained in the record on appeal, as follows:

Statement of the Points Upon Which Plaintiff-Appellant Intends to Rely on Appeal

Plaintiff and appellant, Carnation Company, states the points upon which it intends to rely on appeal, as follows:

The district court erred in granting the motions to dismiss this action and in dismissing the action.

The district court erred in dismissing the action on the ground that it had no jurisdiction to proceed with the action and that exclusive primary jurisdiction and/or primary jurisdiction is in The Federal Maritime Commission.

The court erred in granting the application of The Federal Maritime Commission to intervene in this action.

The complaint herein states a claim upon which relief can be granted for threefold the damages sustained by plaintiff and its cost of suit, including a reasonable attorney's fee, on account of injuries suffered by plaintiff in its business and property by reason of violation, by the defendants, of the antitrust laws of the United States (and particularly sections 1 and 2 of the Sherman Act, Act of July 2, 1890, c. 647, 27 Stat. 209, §§ 1 and 2, as amended, (15 U. S. C. §§ 1 and 2)). Such relief is authorized by, and jurisdiction to grant such relief is conferred on the above entitled court by, § 4 of the Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, § 4 (15 U. S. C. § 15). No impediment to the granting of such relief, and no reason why the court should not exercise such jurisdiction, is presented by any laws of the United States or otherwise, and more particularly no such impediment or reason is provided by, or results from, the Shipping Act of 1916, Act of September 7, 1916, c. 451, 39 Stat. 728, as amended, (46 U. S. C. § 801ff) or acts or executive orders in connection with the [fol. 183] establishment of the United States Shipping Board or any of its successor agencies, including the Federal Maritime Board and/or The Federal Maritime Com-

mission or any other agency charged with the enforcement of, or any functions under, said Shipping Act of 1916.

More particularly plaintiff and appellant will make the following points on appeal:

The court erred in holding that primary jurisdiction and/or exclusive primary jurisdiction of this action or to award to plaintiff any relief on account of the matter stated in plaintiff's complaint is in The Federal Maritime Commission or under the Shipping Act of 1916, as amended. The antitrust statutes have not been repealed, in whole or in part, by the Shipping Act of 1916, as amended, nor have any of the remedies provided for in the antitrust statutes been superseded or suspended by the Shipping Act of 1916, as amended, or by any remedy provided for in said Act, and any remedy provided in said Act is not adequate and will not give the full measure of relief to which plaintiff is entitled under the antitrust statutes. The Federal Maritime Commission does not have exclusive jurisdiction of the matters complained of by the plaintiff nor does the Shipping Act of 1916, as amended, provide the exclusive remedy for the matters of which plaintiff complains. Plaintiff's complaint does not present any administrative question nor any question which, under the doctrine of primary jurisdiction or otherwise, should be or must be submitted to The Federal Maritime Commission before the above entitled court should exercise its jurisdiction of this action, and if there were it would warrant only a stay not dismissal. The above entitled court should proceed to the adjudication of this cause, whether or not any matter alleged by plaintiff constituted violation by the defendants, or any of them, of the Shipping Act of 1916, as amended.

Plaintiff, on appeal, will further make the point that none of the grounds of motion of defendants or of defendant-intervener stated in their motions to dismiss are well taken.

[fol. 184] Plaintiff-appellant, as a point on appeal, will urge that defendant-intervener has no interest in this action, that granting its motion for leave to intervene was in

error and that plaintiff-appellant's objections to intervention by defendant-intervener should have been sustained.

Points Which Will Not Be Raised and Matter Which Will Not Be Designated

The plaintiff-appellant will not raise any question as to due and proper service by defendants' and defendant-intervener's papers and, accordingly, will not designate for inclusion in the record proof of service of such papers. Plaintiff-appellant will not claim that the motions of defendants and defendant-intervenor were not timely and, accordingly, will not designate for inclusion in the record stipulations extending time.

Plaintiff-appellant will make no point of want of notice of hearing or opportunity to be heard and, accordingly, will not designate for inclusion in the record stipulations and orders for time of hearing or filing of memoranda.

Plaintiff-appellant will not make any point that the papers of defendants and defendant-intervener were insufficient to raise and present the question upon which the court ruled and, accordingly, will not designate for inclusion in the record any of the briefs or memoranda of defendants or defendant-intervener although the same may be referred to in motions.

Plaintiff-appellant will not make a point that anything which occurred at the hearings is material to the determination of this appeal and, accordingly, will not designate for inclusion in the record any stenographic report of proceedings at the hearings, nor will plaintiff-appellant make any point that any factual material was before the court upon the determination of the motion to dismiss except such as appears from the complaint and the affidavit of Thomas Lisi and its attachments proffered by defendant-intervener and this will be designated for inclusion in the record on appeal.

[fol. 185]

Designation of the Portions of the Record, Proceedings, and Evidence to Be Contained in the Record on Appeal

Plaintiff-appellant designates the portions of the record, proceedings and evidence to be contained in the record on appeal as follows:

1. Copy of the clerk's docket entries.

2. Endorsement of filing of all documents hereafter designated (including on the affidavit of Thomas Lisi the endorsement of the filing of the memorandum to which it was attached). Proofs of service of documents are to be omitted.

3. The plaintiff's complaint.

4. Motion to dismiss of defendants, members and former members of the Far East Conference etc., and notice of hearing dated February 28, 1963 and filed March 1, 1963 including the attached schedule of defendants on whose behalf this motion is made but excluding the attached memorandum, and other attachments.

5. Motion to dismiss of Pacific Westbound Conference and other defendants, and notice of hearing dated March 1, 1963 and filed March 1, 1963 but excluding the attached memorandum and other attachments.

6. Motion of The Federal Maritime Commission to intervene as defendant and notice of hearing filed March 1, 1963, but excluding attachments.

7. Intervener's answer lodged March 1, 1963.

8. Motion of The Federal Maritime Commission as defendant-intervener to dismiss, and notice of hearing filed March 1, 1963, but excluding attachments.

9. Affidavit of Thomas Lisi (attached to memorandum of defendant-intervener (filed March 1, 1963) with attachments, noting that a duplicate with attachments, was also

attached to a memorandum of Pacific Westbound Conference et al. filed March 1, 1963.

[fol. 186] 10. Plaintiff's objection to motion of The Federal Maritime Commission for leave to intervene as defendant, filed March 21, 1963.

11. Order (by Hon. W. T. Sweigert) dated and filed April 30, 1963.

12. Memorandum of opinion (by Hon. W. T. Sweigert) dated June 20, 1963 and filed June 21, 1963.

13. Order and judgment of dismissal (by Hon. George B. Harris) dated June 25, 1963, filed June 26, 1963 and entered in the docket June 27, 1963.

14. Plaintiff's notice of appeal.

15. Plaintiff's cost bond on appeal.

16. This statement of points on appeal and designation of record.

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Bledsoe, Smith, Phelps, Cathcart & Johnson (formerly Dunne, Dunne & Phelps), By Arthur B. Dunne, Attorneys for plaintiff-appellant, Carnation Company, a corporation, 333 Montgomery Street, San Francisco 4, California.

[fol. 187] Proof of Service (omitting in printing).

Certificate of Service by Mail (omitted in printing).

[fol. 188] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil Action No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants.

APPELLEES' DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL (FRCP RULE 75(a))—Filed July 29, 1963

In addition to that portion of the record specified by plaintiff in its designation filed and served on July 19, 1963, the above-captioned defendants hereby designate the following portions of the record, proceedings and evidence for inclusion in the record on appeal:

1. Memorandum in support of motion to dismiss filed March 1, 1963, on behalf of defendants Pacific Westbound Conference et al including copy attached thereto (and marked "Appendix B") of the table of contents of hearing counsel's opening brief in Docket No. 872 before the Federal Maritime Commission. Other attachments to [fol. 189] this memorandum have already been designated by plaintiffs.

2. Memorandum in support of motion to dismiss filed March 1, 1963, on behalf of common carriers by water, members and former members of, the Far East Conference,

including copy attached thereto of notice of investigation and hearing, served October 30, 1959, by the Federal Maritime Board in Docket No. 872.

3. Memorandum in support of defendant-intervener Federal Maritime Commission's motion to intervene filed March 1, 1963.

4. Memorandum in support of defendant-intervener's motion to dismiss filed March 1, 1963. The attachments thereto have already been designated by plaintiff.

5. Intervener's answer filed March 1, 1963.

6. Plaintiff's memorandum in opposition to motions to dismiss filed March 21, 1963.

7. Reply memorandum of the Far East Conference and members and former members thereof, filed April 3, 1963.

8. Defendant-intervener's reply memorandum in support of motion to dismiss filed April 3, 1963.

9. Reply brief of defendants Pacific Westbound Conference et al, filed April 3, 1963.

10. Transcript of hearing before the Honorable W. T. Sweigert, United States District Judge on April 8, 1963.

11. Memorandum of defendant-intervener, Federal Maritime Commission, on further argument, filed May 27, 1963.

12. Memorandum of defendants, Far East Conference and members and former members thereof on further argument, filed June 5, 1963.

[fol. 190] 13. Supplemental memorandum on behalf of Pacific Westbound Conference et al on a question raised by the court, filed June 5, 1963.

14. Plaintiff's memorandum on further argument of motion to dismiss filed June 5, 1963.

15. Transcript of hearing before Honorable W. T. Sweigert, United States District Judge, on June 11, 1963.

16. Appellees' designation of additional record filed July 29, 1963.

Defendants do not designate the remainder of the file, such as stipulations as to time and orders and stipulations dismissing certain defendants without prejudice.

Transcript of the two hearings designated for inclusion have been ordered from the Court Reporters and copies will be filed with the Court as soon as completed.

Dated: July 29, 1963.

Lillick, Geary, Wheat, Adams & Charles, By: William H. King, Attorneys for Defendants, 311 California Street, San Francisco 4, California.

Herman Goldman, Elkan Turk, Elkan Turk, Jr., Sol D. Bromberg, Of Counsel, 120 Brodaway, New York 5, New York.

[fol. 191] Certificate of Service by Mail by Attorney (omitted in printing).

Receipt of Service (omitted in printing).

[fol. 192] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 18926

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD MATERIAL TO THE CONSIDERATION OF THE APPEAL RECORD TO BE PROVIDED AGREEABLY TO RULE 10—Filed September 30, 1963

[fol. 193] Heretofore the appellant Carnation Company, a corporation, plaintiff in that certain action in the United States District Court for the Northern District of California, Southern Division, entitled and numbered "Carnation Company, a corporation, Plaintiff v. Pacific Westbound Conference, an unincorporated association, et al., Defendants, and The Federal Maritime Commission, Defendant Intervener" Civil Action No. 41153, appealed to the above entitled court from the order and judgment made in said action on June 25, 1963, filed therein on June 26, 1963 and entered therein on June 27, 1963 and said appeal has been docketed in the above entitled court shortly entitled as above and numbered 18926. Now agreeably to Rules 10 and 17(6) of the Rules of the above entitled court appellant presents herewith a concise statement of the points upon which appellant intends to rely and a designation of all of the record which is material to the consideration of the appeal, and appellant elects to provide said record and

copies agreeably to Rule 10 of the Rules of the above entitled court.

I

Statement of the Points Upon Which Appellant Intends to Rely on Appeal

Appellant, Carnation Company, states the points upon which it intends to rely on appeal, as follows:

The court below erred in granting the motions to dismiss this action and in dismissing the action.

The court below erred in dismissing the action on the ground that it had no jurisdiction to proceed with the action and that exclusive primary jurisdiction and/or primary jurisdiction is in The Federal Maritime Commission.

[fol. 194] The court below erred in granting the application of The Federal Maritime Commission to intervene in this action.

The complaint herein states a claim upon which relief can be granted for threefold the damages sustained by plaintiff (appellant) and its cost of suit, including a reasonable attorney's fee, on account of injuries suffered by plaintiff (appellant) in its business and property by reason of violation, by the defendants (other than intervener), of the antitrust laws of the United States (and particularly sections 1 and 2 of the Sherman Act, Act of July 2, 1890, c. 647, 27 Stat. 209, §§ 1 and 2, as amended, (15 U. S. C. §§ 1 and 2)). Such relief is authorized by, and jurisdiction to grant such relief is conferred on the court below by, § 4 of the Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, § 4 (15 U. S. C. § 15).* No impediment to the granting of such relief, and no reason why the court below should not have exercised such jurisdiction, is presented by any laws of the United States or otherwise, and more particularly no such impediment or reason is provided by, or results from, the Shipping Act of 1916, Act of September 7, 1916, c. 451, 39 Stat. 728, as amended, (46 U. S. C. § 801ff) or

* Also 28 USC §§ 1331 and 1337.

acts or executive orders in connection with the establishment of the United States Shipping Board or any of its successor agencies, including the Federal Maritime Board and/or The Federal Maritime Commission or any other agency charged with the enforcement of, or any functions under, said Shipping Act of 1916.

More particularly appellant will make the following points on appeal:

The court below erred in holding that primary jurisdiction and/or exclusive primary jurisdiction of this action or to award to plaintiff (appellant) any relief on account of the matter stated in plaintiff's (appellant's) complaint is in The Federal Maritime Commission or under the Ship- [fol. 195] ping Act of 1916, as amended. The commerce involved in this action is foreign commerce. In respect of such commerce the antitrust statutes have not been repealed, in whole or in part, by the Shipping Act of 1916, as amended, nor have any of the remedies provided for in the antitrust statutes been superseded or suspended by the Shipping Act of 1916, as amended, or by any remedy provided for in said Act, and any remedy provided in said Act is not adequate and will not give the full measure of relief to which plaintiff (appellant) is entitled under the antitrust statutes. The Federal Maritime Commission does not have exclusive jurisdiction of the matters complained of by the plaintiff (appellant) nor does the Shipping Act of 1916, as amended, provide the exclusive remedy for the matters of which plaintiff (appellant) complains. Plaintiff's (appellant's) complaint does not present any administrative question nor any question which, under the doctrine of primary jurisdiction or otherwise, should be or must be submitted to The Federal Maritime Commission before the court below should have exercised its jurisdiction in this action, and if there were any such question it would warrant only a stay not dismissal. The above court below should have proceeded to the adjudication of this cause, whether or not any matter alleged by plaintiff (appellant)

constituted violation by the defendants, or any of them, of the Shipping Act of 1916.

Appellant will further make the point that none of the grounds of motion of defendants or of defendant-intervener (the appellees) stated in their motions to dismiss were well taken.

Appellant will urge that defendant-intervener (an appellee) has no interest in this action, that granting its motion [fol. 196] for leave to intervene was in error and that appellant's objections to intervention by defendant-intervener (an appellee) should have been sustained.

II

Points Which Will Not Be Raised and Matter Which Will Not Be Designated

The appellant will not raise any question as to due and proper service of defendants' and defendant-intervener's papers and, accordingly, will not designate for the record proof of service of such papers. Appellant will not claim that the motions of defendants and defendant-intervener were not timely and, accordingly, will not designate for the record stipulations extending time.

Appellant will make no point of want of notice of hearing or opportunity to be heard and, accordingly, will not designate for the record stipulations and orders for time of hearing or filing of memoranda.

Appellant will not make any point that the papers of defendants and defendant-intervener were insufficient to raise and present the question upon which the court ruled and, accordingly, will not designate for the record any of the briefs or memoranda of defendants or defendant-intervener although the same may be referred to in motions.

Appellant will not make a point that anything which occurred at the hearings is material to the determination of this appeal and, accordingly, will not designate for the record any stenographic report of proceedings at the hearings, nor will appellant make any point that any factual material was before the court upon the determination of the motion

to dismiss except such as appears from the complaint and the affidavit of Thomas Lisi and its attachments. Said affi- [fol. 197] davit with its attachments will be designated for inclusion in the record on appeal and by this designation it is identified as having been presented to the court below on appellees' motions.

III

Designation of the Record Which Is Material to the Consideration of This Appeal

Appellant designates the record, which is material to the consideration of this appeal, as follows:

1. Copy of the clerk's docket entries.

2. Endorsement of filing of all documents hereafter designated (except on the affidavit of Thomas Lisi). Proofs of service of documents are to be omitted.

3. The plaintiff's complaint.

4. Motion to dismiss of defendants, members and former members of the Far East Conference etc., and notice of hearing dated February 28, 1963 and filed March 1, 1963 including the attached schedule of defendants on whose behalf this motion is made but excluding the attached memorandum, and other attachments.

5. Motion to dismiss of Pacific Westbound Conference and other defendants, and notice of hearing dated March 1, 1963 and filed March 1, 1963 but excluding the attached memorandum and other attachments, except Lisi affidavit and attachments, No. 9 designated below.

6. Motion of The Federal Maritime Commission to intervene as defendant and notice of hearing filed March 1, 1963, but excluding attachments.

7. Intervener's answer lodged March 1, 1963.

[fol. 198] 8. Motion of The Federal Maritime Commission, as defendant-intervener, to dismiss, and notice of

hearing filed March 1, 1963, but excluding attachments except Lisi affidavit and attachments, No. 9 designated below.

9. Affidavit of Thomas Lisi (attached to memorandum of defendant-intervener, filed March 1, 1963) with attachments, and this will serve as a notation that a duplicate, with attachments, was also attached to a memorandum of Pacific Westbound Conference et al. filed March 1, 1963 and was presented to the court below on the motions to dismiss.

10. Plaintiff's objection to motion of The Federal Maritime Commission for leave to intervene as defendant, filed March 21, 1963.

11. Order (by Hon. W. T. Sweigert) dated and filed April 30, 1963.

12. Memorandum of opinion (by Hon. W. T. Sweigert) dated June 20, 1963 and filed June 21, 1963.

13. Order and judgment of dismissal (by Hon. George B. Harris) dated June 25, 1963, filed June 26, 1963 and entered in the docket June 27, 1963.

14. Plaintiff's (appellant's) notice of appeal.

15. Plaintiff's (appellant's) bond on appeal.

16. Plaintiff's (appellant's) statements of points on appeal and designation of record filed in the court below.

17. Appellees' designation of additional portions of record filed in the court below.

[fol. 199] 18. This statement and designation.

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Bledsoe, Smith, Phelps, Cathcart & Johnson (formerly Dunne, Dunne & Phelps), By Arthur B. Dunne, Attorneys for appellant, Carnation Company, a corporation, 333 Montgomery Street, San Francisco 4, California.

[fol. 200] Proof of Service

Receipt of a copy of the foregoing Statement of Points etc. and Designation of Record etc. is hereby admitted this .... day of ...., 1963.

Edward D. Ransom, William H. King, Lillick, Geary, Wheat, Adams & Charles, By .... Attorneys for Appellees.

Certificate of Service by Mail (omitted in printing).

[fol. 202]

In the United States Court of Appeals

For the Ninth Circuit

Before: Chambers, Pope & Jertberg, Circuit Judges.

Minute Entry of Argument and Submission—
April 6, 1964

This cause coming on for hearing, Mr. Arthur B. Dunne, argued for the appellant, Mr. Edward D. Ransom, argued for the appellee Pacific Westbound Conference, et al., Mr. Elkan Turk, Jr., argued for the appellee Far East Conference etc., and Mr. Robert B. Hood, Jr., Attorney, Federal Maritime Commission, argued for the appellee Federal Maritime Commission, thereupon the Court Ordered the cause submitted for consideration and decision.

[fol. 203]

In the United States Court of Appeals

For the Ninth Circuit

Before: Chambers, Pope & Jertberg, Circuit Judges.

Minute Entry of Order Directing Filing of Opinion and Filing and Recording of Judgment—July 30, 1964

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[fol. 204]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,926

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, FAR EAST CONFERENCE and the FEDERAL MARITIME COMMISSION, et al., Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPINION—July 30, 1964

Before: Chambers, Pope and Jertberg, Circuit Judges.

Pope, Circuit Judge.

On December 5, 1962, the appellant Carnation Company filed in the court below its complaint against Pacific Westbound Conference and Far East Conference, and numerous individual shipping lines, members of those conferences, seeking recovery of treble damages under the antitrust acts[1] on account of damages claimed to have been suffered by Carnation through an alleged unlawful combination fixing prices and rates for shipment of Carnation's manufactured products to the Philippine Islands, pursuant to agreements among them which had not been filed with or approved [fol. 205] by the Federal Maritime Commission.[2] This ap-

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[1] Jurisdiction was invoked under Sections 1 and 2 of the Sherman Act (26 Stat. 209, 15 U.S.C. Secs. 1 and 2), Section 4 of the Clayton Act (38 Stat. 731, 15 U.S.C. Sec. 15) and Secs. 1331 and 1337 of Title 28, U.S.C.

[2] Sec. 15 of the Shipping Act, 1916, (46 U.S.C. Sec. 814) as it read on the dates involved in this action, provided that common carriers by water shall file with the Commission a copy of every

peal is from an order dismissing the action on the ground that the matters complained of were within the primary jurisdiction of the Commission.

Each of the defendant conferences had on file with the Maritime Commission an approved agreement of the kind referred to in Sec. 15 of the Shipping Act. Pacific Westbound Conference's approved agreement known as No. *57*, was designed, among other things, to carry out the purpose of that Conference to fix the rates at which conference members would serve shippers in foreign commerce westbound from Pacific Coast ports. The Far East Conference had a similar approved agreement designated as No. *17* on the records of the Commission. In addition, the members of the two conferences had another agreement providing for joint fixing of rates by both conferences, known as No. *8200*, which was approved on December 29, 1952. The burden of the complaint of Carnation is that a certain increased rate fixed and put into effect, relating to plaintiff's product and its rates for shipping over the routes traversed by the members of the Pacific Westbound Conference, was established between the members of both conferences, not pursuant to Agreement No. *57*, nor pursuant to Agreement No. *8200*, the approved agreements, but pursuant to another agreement which was not presented to or approved by the Commission. Accordingly, it is said the fixing of that rate was a per se violation of the Sherman Act. This forms the basis for Carnation's claim for treble damages.

Prior to the institution of the present action, on October 26, 1959, the Federal Maritime Board, predecessor agency

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agreement with another carrier fixing or regulating transportation rates or fares controlling or regulating competition, or providing for an exclusive preferential or cooperating working arrangement; the Commission was authorized to disapprove any such agreement which it found to be unjustly discriminatory or unfair or otherwise in violation of the Act but it was required to approve all other agreements; and it provided that "every agreement . . . lawful under this section shall be excepted from the provisions of Sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

[fol. 206] to the Federal Maritime Commission,[3] ordered an investigatory proceeding entitled "No. 872, Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference" instituted pursuant to Sections 15, 16, 17 and 22[4] of the Shipping Act. The order directed that the Board "enter upon an investigation and hearing to determine whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of said Sec. 15, and whether it is being carried out in a manner which makes it unjustly discriminatory or unfair," etc.

The Carnation Company on September 3, 1960, petitioned the Board for leave to intervene in that proceeding, and on September 8, following, leave so to intervene was granted.[5]

Hearing was had in this matter before an examiner and extensive sessions were held in San Francisco, New Orleans and Washington. The examiner filed an initial decision on

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[3] When the Shipping Act of 1916 was passed it vested its administration in the United States Shipping Board. By a succession of Executive Orders this board was succeeded first by the United States Maritime Commission, then by the Federal Maritime Board, and finally by the present Federal Maritime Commission.

[4] U.S.C.A. Sec. 821: "Complaints to Board and investigations. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter."

[5] Other parties, including some Pacific Coast ports, also intervened, on grounds not material here.

August 30, 1963, which is reported in 2 Pike & Fischer, Ship. Reg. Rep. 900. The issues presented at this hearing by Car- [fol. 207] nation and others included in general the same matters and claims set forth in Carnation's complaint in this case.

The complaint alleges that in January, 1953, defendants met at Santa Barbara, California, and then and there secretly conspired and agreed to fix rates for transportation of commodities by members of the Pacific Westbound Conference from Pacific Coast ports of the United States to the Far East "not as provided in said Agreement No. 57 and not as provided in said Agreement No. 8200", and thereafter met and secretly renewed said association and agreement and agreed as follows: (a) Neither Conference nor any member thereof "should disclose to any shipper information regarding rate changes and/or the position of either Conference or of any member of either Conference regarding rate requests;" (b) Both Conferences would fix and agree upon the rates for transportation of commodities by water by members of Pacific Westbound Conference in trade from Pacific Coast ports to the Far East including the Philippine Islands; and that the rate so fixed should be given out by Pacific West Coast "falsely pretending to act as such and under said Agreement No. 57;" (c) Pacific Westbound Conference, contrary to the provisions of Agreement 57 and Agreement 8200 would make no change in any rate established by it or fixed as aforesaid, without the concurrence of the Far East Conference with the exception of the commodities placed on a "list of initiative items", which did not include condensed or evaporated milk; that rates for evaporated milk were agreed upon and issued. The complaint further states that the Conferences and their members, acting pursuant to the agreement alleged, agreed to increase rates on evaporated milk from the United States to the Philippine Islands by $2.50 per ton, purportedly pursuant to the provisions of Agreement No. 57, and these rates were put into effect over the plaintiff's protest; that this was done pursuant to the above described secret agreement which was

never submitted to the Commission and that carrying it out was an unlawful combination and conspiracy in restraint of trade.

It was alleged further that in November, 1957, plaintiffs requested Pacific Westbound Conference to reduce such rate by $2.50 per ton to the rate previously established; that the Pacific Westbound Conference was willing to grant that [fol. 208] request subject to the concurrence of the Far East Conference; that the defendant Far East Conference declined to grant such concurrence; that in advising plaintiff of its denial of the request for reduction Pacific Westbound Conference represented that the members of that Conference, after long and careful study, though initially disposed to grant a reduction, denied the same; that this statement was false in that the request for reduction was in fact declined by reason of Far East Conference's refusal to concur in the reduction; and that plaintiff did not learn of these matters until disclosure thereof was made in May, 1961, in the course of the proceedings before the Commission which is described above.

It thus appears that prior to and at the time of the institution of this action the Commission had under investigation substantially the same question as that sought to be raised by the complaint filed under the antitrust laws. The Federal Maritime Commission was granted leave to intervene in this action in the court below. Intervener and all defendants moved to dismiss the action on the ground that the Shipping Act provided the exclusive remedy for the wrongs alleged in the complaint, and that the court was without jurisdiction to proceed.[6] The motion to dismiss was granted.

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[6] The motion asserted that the acts alleged in the complaint constituted charges of violations of provisions of the Shipping Act which, to the extent of such acts and charges, supersedes the antitrust laws, and that the remedy for such charges was that afforded by the Shipping Act; that the Court is without jurisdiction of the subject matter; that the practices adopted by the carrier in connection with the rates established by them are within the exclusive jurisdiction of the Federal Maritime Commission,

In dismissing the action, the court below relied upon the decisions in the cases of U. S. Nav. Co. v. Cunard Steamship Co., 284 U.S. 474, and Far East Conf. v. United States, 342 U.S. 570. It seems plain to us that both of these decisions support and require the action of the court below.

[fol. 209] In Cunard the action was brought by the Navigation Company to enjoin the respondent steamship companies from continuing an alleged combination and conspiracy in violation of the Sherman Act and the Clayton Act. The trial court there granted a motion to dismiss on the ground that the matters complained of were within the exclusive jurisdiction of the United States Shipping Board under the Shipping Act of 1916. The bill there alleged that the defendant corporations were engaged in carrying 95 percent of the cargo trade from Atlantic ports of the United States to the ports of Great Britain and Ireland and those defendants and the plaintiff were the only lines maintaining general cargo services in that trade. It was charged that the defendants had entered into a combination and conspiracy to restrain the foreign trade and commerce of the United States in respect to carriage of cargo over the routes mentioned and with the object and purpose of driving the petitioner and all others not parties to the combination out of such trade and commerce. The conspiracy was said to involve the establishment of a general tariff rate and a lower contract rate, the lower rate to be made available only to shippers who agreed to confine their shipments to the lines of the defendants. These were alleged to be coercive measures not predicated upon differences in volume or frequency of service but rather to be wholly arbitrary.

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which is authorized to afford complete remedy with respect thereto. Attention was called to the proceeding then pending before the Maritime Commission in which substantially the same issues as those tendered by the complaint would be decided by the Commission. In support of its motion to dismiss, the Maritime Commission filed an affidavit by its Secretary setting forth portions of the record in its docket No. 872 previously mentioned.

It was conceded that looking to the Sherman Anti-Trust Act alone the bill stated a cause of action under Secs. 1 and 2 of the Sherman Act which would warrant an injunction under Sec. 16 of the Clayton Act unless the Shipping Act stood in the way. When the case reached the Supreme Court, that Court's opinion proceeded to state the provisions of the Shipping Act which it described as "a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." (P. 480) After reviewing other decisions of the Court, and particularly the case of Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, the Court affirmed the dismissal of the action upon the ground that the matter was "within the exclusive preliminary jurisdiction of the Shipping Board." [7]

[fol. 210] The Court reached this conclusion despite the allegation in the bill that the agreement in question had not

[7] The Court said: "The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. . . .

"A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws. Compare Keogh v. Chicago & N.W. Ry. Co., supra, at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board." 284 U.S. at 485.

been filed with the Board pursuant to Sec. 15 of the Shipping Act. The Court stated (p. 486): "But a failure to file such an agreement with the board will not afford ground for an injunction under Sec. 16 of the Clayton Act at the suit of private parties . . . since the maintenance of such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist." [8]

The Cunard case was followed by Far East Conf. v. United States, supra, decided in 1952. That also was a suit to enjoin alleged violations of the Sherman Antitrust Act [fol. 211] but it differed from the action in the Cunard case in that this suit was brought by the United States. The violation of the Act complained of was that the defendants, the Far East Conference, and its members, had entered into an agreement establishing a dual rate system. The defendants moved that the complaint be dismissed on the ground that issues involved should properly first be adjudicated before the Federal Maritime Board rather than a district court. The Court said: "We see no reason to depart from [Cunard]. That case answers our problem." [9] The Court characterized the rationale of Cunard as follows: (342 U.S. at 574) "The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exer-

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[8] The reasoning by which the Court arrived at this conclusion, as stated in this quotation, includes a discussion of Sec. 15 of the Shipping Act. After referring to the agreements mentioned in that section the Court said: "Thereupon the board is authorized to disapprove, cancel or modify any such agreement, *'whether or not previously approved by it,'* which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., 'or to operate to the detriment of the commerce of the United States, or to be in violation of this Act.' . . . . If there be a failure to file an agreement as required by Sec. 15, the board, as in the case of other violations of the act, is fully authorized by Sec. 22 supra to afford relief upon complaint or upon its own motion." (Emphasis added.)

[9] The fact that the suit was brought by the United States instead of by a private party was held no basis for distinction from the Cunard case.

cise of administrative discretion, agencies created by Congress by regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

As noted in the dissenting opinion in Far East, although the conference agreement was approved by the United States Shipping Board, that agreement did not contain any provision for dual rates. It was the dual rate aspect of the defendants' arrangement which was the basis for the Government's antitrust suit. The dissent argued that if the Board had expressly approved the dual rate system there would be immunity from the Sherman Act, but since the agreement as put in operation had not been fully approved, the Court should not hold that the exclusive primary jurisdiction was in the Board. The Court majority did not accept that contention. In Far East, as in Cunard, exclusive primary jurisdiction was in the Board or Commission not- [fol. 212] withstanding the questioned provisions of the agreement had not been approved by the Board.

Appellants here argue that neither Cunard nor Far East control this case, since it involves proceedings not to procure an injunction but to recover damages on behalf of a private corporation. There are two reasons why we reject that suggested distinction. In the first place, the considerations which make up the rationale of Cunard and Far East are fully as applicable in a treble damage suit as in one seeking injunction. Preliminary resort to the Commission is as necessary here in order to secure the uniformity of application of the Congressional scheme, and in order to procure resolution of the facts by a body having an adequate appreciation of the intricate business of transportation by sea.

As stated in Far East (342 U.S. at 574) the Cunard cas "applied a principle, now firmly established, that in case raising issues of fact not within the conventional experienc of judges or cases requiring the exercise of administrativ discretion, agencies created by Congress for regulating th subject matter should not be passed over." Later in thi opinion we shall note more fully why this is that sort c case; and it has such character no less because this suit i one for treble damages.

The second reason is the existence of authority to the cor trary. The Second Circuit rejected an almost identical cor tention in American Union Transport v. River Plate Brazil Conferences, 2 Cir., 222 F. 2d 369, where it affirme a dismissal of a treble damage antitrust suit on the distric court's opinion, 126 F. Supp. 91.[10]

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[10] Plaintiff in that case sued conference members for treble dan ages, alleging a conspiracy to restrain foreign trade by denyin payment to plaintiff of freight brokerage. The Board had juri diction under the Shipping Act to include the regulation of freigh forwarders and brokers, and had done so. Defendants had put in effect their procedures pursuant to an unfiled and unapprove agreement. The opinion, so adopted, followed and applied Cunar and Far East, saying: "The failure to file an agreement, . . whatever other effect such failure may have, does not leave th offending parties 'at large', subject to the antitrust laws. If the is any inconsistency apparent between this conclusion and th language of Sec. 15 of the Shipping Act, as pointed out by M Justice Douglas, the clear language of the Supreme Court author tatively compels the decision. . . . Although the court is not aske for injunctive relief, it is not at all clear that judicial interventio in this field even to the extent of trying a case for damages woul not interfere with the uniformity of treatment and the regulator policy of the board based on specialized considerations withi its exclusive competence. . . . It appears indeed, that the plainti has filed a complaint with the board against the present defendan asking for reparations under Sec. 22 of the act and for a cea and desist order. It is unreasonable to suggest that the plainti may not seek relief from the board under that section, whic permits 'any person' to file a complaint. Consequently, a ca is presented within the exclusive primary jurisdiction of the Fe eral Maritime Board." 126 F. Supp. 93.

Since the argument in this case the Second Circuit has decid Trans World Airlines v. Hughes, ... F. 2d ......, (June 2, 1964

(footnote continued on following pag

[fol. 213] Appellants have attempted to demonstrate that the rule applied in Cunard and Far East would no longer be acceptable to the Supreme Court; that those cases have, because of later decisions, been interpreted to mean something different than what they seem to hold. This contention is one which we cannot accept. As late as 1963, in United States v. Philadelphia Nat. Bank, 374 U.S. 321, 353, the Court cited with apparent approval the Far East Conference case as holding that judicial abstention is required "where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." And as an inferior federal court we are not [fol. 214] about to make rulings based on any assumption that the Supreme Court is likely to repudiate its former decisions.[11]

The question presented was whether certain conduct of the defendant charged to amount to an attempt to monopolize the business of selling aircraft and aircraft supplies, was immunized from antitrust recovery because of primary jurisdiction in the Civil Aeronautics Board. Holding that such primary jurisdiction did not exist the court noted that the acts charged in the Trans World Airlines case were not, as in Pan American World Airways v. U. S., 371 U.S. 296, "precise ingredients of the Board's authority," that the transactions charged were "unrelated to any specific function of the C A B," that the Board was given "no explicit jurisdiction" over such transactions, and that in any event the Board was without power to award money damages. Because of these circumstances the case clearly differed from that court's River Plate decision, which it did not even cite; and, for the same reason, it differs from the present case where the authority of the Maritime Commission is as broad as that stated in Cunard as follows: (284 U.S. at 487) "And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter . . . Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

[11] In Penfield Co. of Cal. v. Securities and Exch. Com'n, 9 Cir., 143 F. 2d 746, 749, this court said: "We cannot agree that an inferior federal court may make its prognostication of the weather in the Supreme Court chambers, however well fortified in judicial reasoning, and forecast that the Supreme Court "seems' about to

We think that appellants' effort to assert the lack of con-tinuing authority of Cunard and Far East is entirely falla-cious and altogether unsupportable.[12]

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overrule its prior decisions, and outrun that Court to the over-ruling goal. It is not a fanciful conjecture that, if such guessin contest were permitted, the ingenuity of judges, stirred by varie philosophies of governmental and social regulations, would fin rational arguments for overruling a score of Supreme Cour decisions. To the strain on the legal profession of many recen overrulings, some enumerated in the last paragraph of Smith v Allwright, 321 U.S. 649, . . . should not be added that of th overruling prescience of ten circuit courts of appeals and upward of ninety district courts."

[12] There is little point in attempting to spell out the manner i which this portion of appellant's argument proceeds. In genera outline it is as follows: In his dissent in the Far East Conferenc case, Justice Douglas took the position that exclusive primar jurisdiction in the Commission did not apply to unfiled agreement and that the dual rate agreement there involved was unapprovabl under Sec. 14 of the Shipping Act.

In Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, at 50 Mr. Justice Frankfurter, who had written the opinion in Fa East Conference, dissented from the majority opinion which hel that particular approved agreement providing for a dual rat system to be in violation of Sec. 14 of the Shipping Act, sayin (at 522): "In both cases [Cunard and Far East Conference] th Court's attention was directed to the claim of *per se* illegality. I both cases the plaintiffs urged that, since the dual-rate contra system violated Sec. 14, the Board was without power to approv it. . . . And in *Far East Conference*, the claim that now prevail was a main ground of dissent." Appellant contends that wha Mr. Justice Frankfurter thus said in this Isbrandtsen case demon strates that the majority in Isbrandtsen were reversing and rejec ing Cunard and Far East Conference. It must be manifest tha appellant's attempt to draw that conclusion from a dissentin opinion must be a fruitless one. This was noted by Mr. Justic Harlan in a separate dissent in that case who disagreed with wha Mr. Justice Frankfurter's dissent said about Cunard and Far Ea Conference. The Isbrandtsen case had nothing to do with th present problem of exclusive primary jurisdiction in the Commi sion. That case reached the court of appeals and then went on t the Supreme Court on a petition to review a decision of the Feder Maritime Board. It had nothing to do with an attempted suit und the antitrust laws; it dealt solely with the question of the legalit of a dual rate system. No issue relating to a dual rate system before us in the present case.

Ordinarily we would be content to rest this case upon the authority of the cases we have here cited. But because of the [fol. 215] vigor and earnestness with which appellant has argued that those cases are not controlling here, we now proceed to enumerate some of the reasons why we think the results reached in those cases were inevitable, and why the same conclusion as to exclusive primary jurisdiction in the Commission must be upheld here.

The Shipping Act's Pervasive Regulatory Scheme

In the first place, when we consider the powers and authority of the Commission, we must note that under the Shipping Act, as it was at the time of the matters alleged in the complaint, (and also as it is today), the Commission had, in contrast with the banking agencies in United States v. Philadelphia Nat. Bank, supra, (374 U.S. at 351) "regulatory and remedial powers." In contrast with the powers of the Federal Power Commission in California v. Fed. Power Comm'n., 369 U.S. 482, 485, those granted to the Maritime Commission composed a "pervasive regulatory scheme." The following summary of the provisions of the Shipping Act discloses the extremely broad range of regulatory powers, particularly as concerns shipping in foreign trade, vested in the Commission.[13] "The Act prohibits: (1) deferred rebates, (2) 'fighting ships,' (3) retaliation or discrimination against any shipper, and (4) unfair or unjustly discriminatory contracts with any shipper. A fine of not more that $25,000 for each offense is provided as the penalty for a breach of these provisions. If water carriers—other than citizens of the United States—violate the foregoing provi-

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[13] Since the complaint here refers to acts and things alleged to have been done by the defendants between "before January, 1953" (including November, 1952) to and including May, 1961, we have chosen to describe the powers of the Commission under the Shipping Act as that Act existed prior to the amendments of October 3, 1961, Pub. L. 87-346, 75 Stat. 762. A consideration of the 1961 amendments would lead to no different conclusion than that we reach here.

sions or deny an American common carrier admission to a conference on equal terms with all other parties, the Secre- [fol. 216] tary of Commerce, upon certification by the Board, is empowered to bar vessels of the offending parties from United States ports.

"All agreements, understandings, conferences, or other arrangements between parties subject to the act which affect competition in any way, or changes in earlier agreements, must, according to Section 15 of the 1916 act, be filed with the Board. The Board, furthermore, may disapprove, cancel, or modify any such agreement or modification thereof deemed to operate to the detriment of United States commerce, to be in violation of the act or to be 'unjustly discriminatory or unfair' between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Approved agreements are exempted from the anti-trust laws. Violators are subject to a fine of $1,000 for each day of the offense.

"It is unlawful: (1) to give unreasonable preference to any person, locality, or description of traffic, or to subject any of the foregoing to undue disadvantage; (2) to permit by false billing, weighing, etc., transportation at less than regular rates; (3) to influence insurance companies to discriminate against a competitor; and (4) to disclose information detrimental to shippers or consignees. It is also unlawful for any shipper, consignor, or consignee to obtain or attempt to obtain by false billing, false weighing, etc., rates less than otherwise applicable. A fine of not more than $5,000 is provided for each offense.

"The charging of rates or fares that are 'unjustly discriminatory' between shippers or ports, or 'unjustly prejudicial' to United States exporters compared to their foreign competitors, is prohibited, and the Commission is empowered to alter rates which are in violation of this section. Reasonable regulations covering practices relating to receiving, handling, storing, or delivery of property must be observed, and the Board has authority to require the filing of reports, records, etc., of any person subject to the Act.

The Board is also authorized to investigate any violation of the act on its own volition, or upon the filing of a complaint. In the latter case full reparation for injury may be awarded if the complaint is filed within two years of the cause of action." [14]

[fol. 217] A key provision of the Act, significant here, is Sec. 15 (46 U.S.C. Sec. 814) which provides that common carriers and conferences thereof, such as the defendants in this case, shall file their agreements for regulating transportation or rates, or controlling competition, or providing for cooperative working arrangements, with the Commission. The section, as it read at the time here in question, is set forth in the margin.[15] In brief, it authorizes the Board

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[14] This quoted summary is from Marx, International Shipping Cartels: A Study of Industrial Regulation by Shipping Conferences, pp. 106-107.

[15] "Sec. 814. Contracts between carriers filed with Board. Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

(footnote continued on following page)

[fol. 218] to "disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it" that it finds to be unjustly discriminatory or unfair and the Commissioner is required to approve all other agreements. It makes such agreements lawful only when and as soon as approved by the Board, and makes it unlawful to carry out an unapproved agreement. It provides that agreements lawful under the section shall be excepted from the provisions of the antitrust laws and provides a penalty of $1,000 for each day of violation continuance.

Another key section is section 22 (46 U.S.C. Sec. 821) which is set forth in full in footnote 4, supra. It is this section which provides for the filing of complaints with the Commission alleging violation of the Act and asking reparation for the injury caused thereby. The Commission shall investigate complaints and shall make such orders as it deems proper; it is authorized to award full reparations to the complainant. The Board may on its own motion investigate any violation of the Act and make similar orders with respect thereto.

The Act provides for full hearing in relation to any complaint or proceeding pertaining to violations of the Act, for the keeping of records of the Board, and for publication of its reports; it authorizes enforcement of the orders of the Board by district court order, and provides for a review or

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Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

setting aside of orders by the appropriate court.[16] In the exercise of its "regulatory and remedial powers" to enforce the Act's "pervasive regulatory scheme", it is for the Commission to pass upon the following questions: whether the defendants did or did not make certain agreements, whether those agreements, if made were such as to require Commission approval, whether such agreements, if not filed, should nevertheless, now, in the language of the Cunard case, "upon a full consideration of all the attending circumstances, be approved or allowed to stand with modification." These are, as we shall more fully note hereafter, "precise ingredients of the [Commission's] authority." Pan American World Airways v. U.S., 371 U.S. 296, 305.
[fol. 219]

To Establish a Controlled System of Agreements Designed to Limit Competition

Another reason why we think it must have been the congressional intention, as held in the cases previously cited, that exclusive primary jurisdiction should rest with the Maritime Commission, is that the congressional objectives in the passage of the Shipping Act were entirely different from the objectives designed to be obtained through the antitrust acts. In the case of the latter, the congressional purpose was, as has been so often noted, to preserve, protect and enforce full and free competition. But the legislative history of the Shipping Act discloses that Congress had in mind in that enactment a very different objective due to the special problems of shipping lines in foreign trade which called for a special and different mode of regulation than that provided by the antitrust laws.

The Alexander Report[17] which led to the enactment of the

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[16] Since 1950 review of the Commission's orders is by courts of appeals under Chapter 19A of 5 U.S.C. Secs. 1031 to 1042.

[17] House Com. on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliation in the American Foreign and Domestic Trade, 4 H.R. Doc. No. 805, 63d Cong. 2d Sess. (1914) pp. 415 to 421.

Shipping Act, discloses that the object of the Act was to permit a controlled system of agreements designed to *limit* [fol. 220] competition.[18] In these respects it was similar to certain portions of the Federal Aviation Act, concerning which the Court said in Pan American World Airways v. U.S., supra, at p. 301: "Since 1938, the industry has been regulated under a regime designed to change the prior competitive system." The objective of limiting competition led to the provision in Sec. 15 that agreements lawful under 1-11 and 15 of Title 15."
1-11 and 15 of Title 15.'"

In Cunard the Court noted that the proper place to determine whether this special regime designed to change the

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[18] The Committee noted that it had been the almost universal practice for steamship lines engaged in the American foreign trade to operate under the terms of agreements or understandings which had for their purpose the regulation of competition through fixing or regulating of rates, apportionment of traffic, the pooling of earnings, or meeting the competition of non-conference lines. The Committee considered two alternatives: either the prohibition of such agreements with a view to "attempting the restoration of unrestricted competition" or recognizing such agreements and permitting them under circumstances which would eliminate abuses. The Committee noted the advantages and disadvantages of these alternative proposals, and concluded that the advantages which were substantial, "can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under government supervision and control." The Committee observed that "to terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership."

The Committee's recommendation was that the administration of the Act should be left to the Interstate Commerce Commission. That portion of the recommendation was not adopted; instead the Congress established the United States Shipping Board whose functions were later vested in the United States Maritime Commission, which in turn was succeeded by United States Shipping Board, which was in turn succeeded by the Federal Maritime Commission, the present intervener. See Historical Note at 46 U.S.C. 804.

prior competitive system should be effective was before the board.[19]

Under Direction of a Commission Specializing in Ocean Transportation

Another reason for our conclusion is that Congress, in setting up this elaborate system of controlled cooperation in respect to rates, shipping conditions, and other matters relating to carriers in foreign trade, and committing its regulation and enforcement to a special commission, contemplated that this commission would become familiar with the problems of foreign water-borne commerce and develop considerable expertise in connection therewith.

The Act lists many standards whose application requires more than ordinary familiarity with ocean transportation.[20] [fol. 221] Thus it seems appropriate to say that the Commission is the body most qualified to decide what agreements will, or will not, "operate to the detriment of the

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[19] Said the Court (284 U.S. at 487): "And whatever may be the form of the agreement and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.

[20] Some of the phrases used are "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports . . . or to operate to the detriment of the commerce of the United States" (Sec. 15, referring to agreements to be disapproved); "any unfair or unjustly discriminatory contract with any shipper", "other discriminatory or unfair methods" (Sec. 14); "any other unjust or unfair device or means" (Sec. 16); "any rate . . . which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States", the Commission may "order enforced a just and reasonable regulation or practice" (Sec. 17); the carrier by water must establish "just and reasonable regulations and practices" (Sec. 18).

commerce of the United States."[21] As was said in Cunard, supra, (p. 487) "Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

The Commission, so far as we are advised, has not yet acted upon the examiner's initial report; but that report discloses that the examiner has recommended the very thing suggested in the last quotation from Cunard—he has recommended that agreement No. 8200 be amended with changes to comply with his findings, "and that as amended Agreement No. 8200 should be reapproved."[22]

[fol. 222] It seems to us to be wholly inappropriate that a court and jury should, while this proceeding still pends,

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[21] Compare the following from Pan American World Airways v. U. S., at p. 309: "The 'present and future needs' of our foreign and domestic commerce, regulations that foster 'sound economic conditions,' the promotion of service free of 'unfair or destructive competitive practices,' regulations that produce the proper degree of 'competition'—each of these is pertinent to the problems arising under Sec. 411.

It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in Sec. 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under Sec. 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U.S.C. Sec. 1486."

[22] The final paragraph in the examiner's report is as follows: "Based upon the whole record, it is concluded, ultimately, that Agreement No. 8200 has not operated to the detriment of the commerce of the United States or otherwise contravened Section 15 of the 1916 Act, but on the other hand it has been largely beneficial to such commerce; that it should be amended to incorporate the complete agreements found herein to be outside the scope of said agreement, with such changes made therein as will comport with the findings in this decision; and that as amended Agreement No. 8200 should be reapproved."

inject themselves into this matter and undertake to say what portions of the existing agreement are good and what parts are bad.

With a View to Uniformity in Regulation

Again, one prime purpose of the Shipping Act is to procure uniformity in the treatment of ocean carriers and their shippers. The Act is replete with provisions designed to avoid discrimination. See footnote 20, supra. To permit the maintenance of an action such as this would in our view produce for the shipping industry confusion worse confounded, destroy uniformity of interpretation and enforcement of the Shipping Act, and bring about the very type of discrimination which that Act was designed to avoid. We may assume that Carnation is not the only shipper who dislikes the rates fixed for shipment of its product. Carnation might win its suit and another similar concern, making a similar claim, might lose.

The undesirable results of a recovery by Carnation in such a case would be similar to those discussed by the Court in Keogh v. C. & N.W. Ry. Co., 260 U.S. 156, which was an action to recover damages alleged to have resulted from a combination to fix railroad rates in restraint of interstate commerce. The complaint alleged that certain uniform rates, fixed by an association of railroads, were arbitrary and unreasonable and higher than those theretofore charged and higher than they would have been if competition had not been eliminated. The rates complained of had been duly filed with and approved by the Interstate Commerce Commission. It was held that Keogh, a private shipper, could not maintain his action for damages, and the action of the lower court in dismissing the case, was affirmed. It was noted that the shipper had recourse under the Interstate Commerce Act to secure redress for damages [fol. 223] suffered in consequence of illegal rates. The Court said: "Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted,

with an additional remedy under the Anti-Trust Act?" The Court said: "This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under Sec. 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under Sec. 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief." Since the Shipping Act vests the Commission with these extensive powers to investigate and bring to a halt the "unjustly discriminatory" and "unfair" acts prohibited and practices which "operate to the detriment of the commerce of the United States", it may be said here, in the language of Pan American World Airways, supra, "if the courts were to intrude independently with their construction of anti-trust laws, two regimes might collide."

This necessity of attaining uniformity in the administration of a regulatory system such as here involved, was noted by Mr. Justice Brandeis in Gt. No. Ry. v. Merchants Elev. Co., 259 U.S. 285, 292, where speaking with reference to the functions of the Interstate Commerce Commission in relation to the construction of tariffs, he said that where a controversy involves any more than a pure question of law "the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained."

Extending Also to Foreign Carriers

Another reason why Congress must have intended to leave the resolution of the problems here present to this specialized commission is that the Shipping Act regulates

not merely American shipping companies but foreign carriers as well. As noted by Marx,[23] the majority of [fol. 224] shipping conferences are international in the sense that they consist of companies under various national flags. An examination of the list of defendants in this suit will disclose that a very large percentage of them are carriers operating under foreign flags and are foreign owned. Those carriers which are not American but which operate on routes between the United States and foreign countries are through the Shipping Act subject to a degree of regulation by this American Commission. The situation is to a degree similar to that mentioned in Pan American World Airways v. United States, supra, at p. 310, where the Court said: "Furthermore, many of the problems presented by this case, which involves air routes to and in foreign countries, may involve military and foreign policy considerations . . ."[24]

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[23] Marx, International Shipping Cartels: A Study of Industrial Regulation by Shipping Conferences, 1953, p. 137.

[24] The Alexander Committee was not unmindful of this situation. Its report (V. 4 p. 416) stated: "The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors."

That the regulation of these conferences does indeed involve delicate foreign policy considerations is apparent from incidents in current history. As reported in the New York Times of July 16, 1964, under Reuters dispatch from London, "Transport Minister Ernest Marples assailed the United States Maritime Commission for 'acting as if the United States has the right to regulate the affairs of the world as a whole' ". He offered a bill authorizing British ministers to order British ship lines "not to comply with American and other foreign shipping laws that the ministers consider an infringement on British jurisdiction." He was quoted as saying: "The Federal Maritime Commission claims the right to dictate to traders and shipowners in this country the form of contracts between them regardless of who owns the ships and where the contract is being negotiated."

All of Which Calls for Administrative Experience and Special Knowledge

In its essence, the appellant's case is tied to its construction of the decision of the Court in Gt. No. Ry. v. Merchants Elev. Co., supra. Says the appellant: "As a matter of decision this case is controlled by Great Northern R. Co. [fol. 225] v. Merchants Elevator Co., above, the case on which Cunard principally relied. This is an even simpler case. In that case there was a question of construction of a tariff. There was no need to resort to the Commission because that was a question of law. In the case at bar there is no need for construction of a tariff at all. We make a case without regard for the tariff terms, because we are concerned only with the illegal charge of $2.50 per ton above the lawful tariff whatever that tariff is."

In our view the case thus relied upon by the appellant has no relation to the problem here before us. That case had nothing to do with any problem arising under the Shipping Act. It was a simple action to recover sums paid the railway company alleged to have been collected in violation of the carrier's tariff. The sole question was whether Rule 10 of the tariff, as filed, called for a reassignment charge of $5 a car for 16 cars of corn which were shipped from Iowa and Nebraska to a station in Minnesota where they were inspected and then rebilled to a station beyond. The sole question was what did the tariff provide and what did its text mean. As an apparent effort to suggest that the present case is like the Great Northern case, appellant asserts that this is "a simple overcharge case." We must disagree.

The whole thrust of the complaint in this case is that the defendants entered into agreements which differ from or were modifications of their filed and approved agreements, such as their Agreement 8200; that the agreements so entered into were required by law to be filed with and approved by the Commission; that this was not done; that pursuant to these unapproved agreements rates were agreed upon and fixed, and that in consequence of the

failure to procure Commission approval, defendants were liable under the antitrust acts.

Cunard and Far East Conference, as we have noted, both hold that failure of approval does not affect the Commission's primary jurisdiction. But even if it did, the question would remain as to whether what defendants did amounted to agreements which required Commission approval. And that is something for the Commission to decide. If it should decide that defendants have been acting under agreements which should have been filed, but were not, the Commission under Sec. 22 of the Act, could adjudge a violation of the Act, as in Trans-Pacific Frgt. Conf. of Japan [fol. 226] v. Federal Maritime Com'n., 9 Cir., 314 F. 2d 928. And, of course, the Commission, as we shall note hereafter, might find the conduct of the defendants in respect to the rates mentioned in the complaint was wholly within and authorized by the filed and approved agreements. But in passing upon these matters the Commission must necessarily employ a specialized judgment and a determination of fact, policy and law, not within the conventional experience of a judge or jury.

The same is true of the alleged agreement not to disclose to any shipper how the members of the Conference voted on rate requests.[25] Of course the Commission may well, under its broad powers to prohibit conduct which it finds to be "unfair" or to "operate to the detriment of the commerce of the United States", adopt a rule requiring disclosure of votes at conference meetings; but a determination of that kind would represent the sort of action which may properly be committed to an administrative body rather than to a court or jury.[26]

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[25] We know of no present rule requiring meetings to be public. The Alexander report mentioned "the secrecy with which agreements and conferences are now conducted," (p. 417 of the Committee Recommendations) yet no effort was made in proposing the resultant legislation to prohibit such secrecy.

[26] The determination of such a policy question would necessarily take into consideration the problem of whether publication of votes

It is complained that the members of both conferences agreed that they would make no changes in rates which had been agreed to without the concurrence of both conferences. It is plain that the arrangement provided for by agreement No. 8200 contemplated joint action in the establishment of rates. It recited that for the accomplishment of the purpose of this agreement "it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates."

The agreement provided that certain actions should be determined only by a concurrence of the two groups "with [fol. 227] respect to the establishment or change of rates." Obviously members of the Far East Conference carrying goods from Atlantic and Gulf ports would be affected by and interested in the rates from Pacific ports. Plainly that is why Agreement 8200 was made. The provision for joint action was eminently a reasonable one. Under Sec. 18 of the Shipping Act if the Commission found that any rate was unjust or unreasonable it could prescribe a reasonable maximum rate. This, again, is a matter for determination by the Commission. But, if the two Conferences agree to an increase of $2.50 per ton on evaporated milk, such was no more than a fixing of rates as contemplated in Agreement 8200. The Shipping Act sets up a system of industry self-regulation. No power to fix or specify rates was granted to the Commission or its predecessors. In contrast with the Interstate Commerce Commission (see 49 U.S.C. Sec. 15) the Maritime Commission does not fix rates. The rates were and are fixed by the Conferences under their approved agreement subject only to the power of the Commission just mentioned to set aside unjust or unreasonable rates.

It is also complained that the agreement contemplated that when the rates were announced Pacific Westbound Con-

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at meetings would be likely to result in the shippers granting their preferences in shipments to carriers who voted for rate reduction. That decisions of this kind are commonly "carefully kept business secrets" is noted in Marx, supra, p. 141. We are not aware of any Commission ruling on this subject.

ference would falsely pretend to act under its Agreement No. 57. The terms of Agreement No. 57 are not in this record. Presumably it, as do most conference agreements, authorizes the fixing of rates by the Conference. Conceivably the Maritime Commission could establish a rule requiring such a conference, when it files its rates and charges with the Commission pursuant to Sec. 18 of the Shipping Act, to specify precisely under which particular approved agreement it is operating when it fixes such rates. We know of no such rule and nothing appears to show that under either Agreement 8200 or Agreement 57 the Conferences have any obligation to specify which approved agreement they are relying upon in fixing a particular rate.

As for the claim that the defendant Conferences entered into a new agreement "contrary to the provisions of said Agreement No. 57 and said Agreement No. 8200" that a rate established or fixed by or for Pacific Westbound Conference and its members would not be changed without the concurrence of Far East Conference, we have for inquiry the question whether such an agreement was made in fact; [fol. 228] whether, if made, it was contrary to Agreement No. 8200; and finally, whether it would be required to be filed with and approved by the Commission.

This calls for a reference to Agreement No. 8200 which was made a part of the record before the district court. We have noted that it expressly provided for and obviously contemplated the establishment of rates by agreements between both conferences. This approved agreement expressly provided that rates should be determined only by a concurrence of the two conferences each acting as a group and in accordance with the procedures prescribed by its conference agreement with respect to the establishment or change of rates. Paragraph "second" of that Agreement was a provision that if either Conference should determine that conditions affecting its operations required an immediate change in its tariffs it could notify the other group specifying the changes it proposed to put into effect 48 hours after giving such notice, if given by telegram, or 72 hours, if given by airmail. It provided for the giving of a

summary of the facts which would justify such independent action.

At the times here in controversy there was nothing in the Shipping Act as it then stood or in the then regulations of the Commission requiring an insertion of such a stipulation in a Conference agreement.[67] The stipulation in this paragraph "second" was obviously inserted by voluntary action of the signatories to Agreement 8200. Its plain reading indicates that the exercise of this right of independent action is discretionary with the conference. Nothing contained therein compels utilization of that privilege and it would appear that the Commission, when it reaches this question, might well hold that the exercise of that privilege could be waived in any particular case; or, on the other hand, the Commission might well hold otherwise; and the Commission might hold with respect to the rate referred to in the complaint here that Pacific Westbound Conference merely waived its right to take that independent action as it then had the right to do. Furthermore, the Commission could well find that this waiver was a single [fol. 229] occurrence that there was no agreement never to use that right of independent action.[68]

The important point here is that these matters presented questions of fact and of policy properly for the specialized competence of the Commission. If the Commission finds that there was a mere temporary waiver of the independent

[67] When Sec. 15 was amended, Oct. 3, 1961, Pub. L. 87-346 Sec. 2, 75 Stat. 763, it contained a new provision that no agreement should be approved between carriers not members of the same conference unless "each conference retains the right of independent action."

[68] The examiner's report, previously mentioned, recited that Pacific Westbound Conference did in fact invoke its right of independent action on one occasion involving Korean relief cargo and one other occasion in reducing rates on Kraft liner board. This would seem to negative any agreement never to act independently. In the hearing before the examiner the Conferences' position was that their privilege of independent action should be employed only in "serious" or "important" situations.

action provision, and not a permanent alteration of the agreement, then it might hold that no filing of the new agreement would be required. The Commission has long recognized that not every arrangement or understanding between carriers must be filed for approval by the Commission.[69]

We must therefore conclude that what is involved here is the conduct of common carriers by water whose "business involves questions of an exceptional character, the solution of which may call for a high degree of expert and [fol. 230] technical knowledge." (284 U.S. at 485) There is first the question of what did the Conferences here actually do. This should be decided, it seems plain, by the Commission which has already entered upon such an inquiry. The next question is whether or not what was done was of such character as to require the presentation for approval of a new agreement. Here we enter upon a matter "well understood by an administrative body especially

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[69] Its regulation, 46 C.F.R. Sec. 222.16, provides as follows: "Statements Not Accepted For Formal Filing. Statements of routine arrangements for carrying out authorized agreements will not be accepted for formal filing by the Board but may be received as information."

In an opinion by the predecessor shipping board, reported at U.S. Maritime Commission Reports Vol. 1, p. 121, consideration was given to the question as to whether the reference in Sec. 15 of the Shipping Act to the filing of "every" agreement was intended to include all arrangements made between carriers in the routine process of carrying out their conference agreements. The Board concluded that the agreements required to be filed are to be distinguished from the mere "routine" conference activities. If what we have here should be found by the Commission to have been a mere temporary waiver by Pacific Westbound Conference of its right of independent action in respect to the rate complained of in the complaint, then the Board might hold that no agreement of a character required to be filed had been entered into. That, however, is a matter for the expertise of the Commission. For a case involving the question of what constitutes a separate agreement required to be filed, see American Export & Isbrandtsen Lines, et al., v. Federal Maritime Commission, et al., (June 24, 1964) 9 cir., ___ F. 2d ___.

trained and experienced in intricate and special facts and usages of the shipping trade." U.S. Nav. Co. v. Cunard S.S. Co., supra, at p. 485.[30]

And finally, under the decisions and the Cunard and Far East Conference cases, even if it should be held that a new agreement had been made here which required approval of the board, the exclusive primary jurisdiction is in the Board and not in the district court.

There is one question in the background of this case which we need not meet at this time. Some doubt is raised in our minds by the language used in the concluding portions of Far East Conference where the Court said (p. 576): "Having concluded that initial submission to the Federal Maritime Board is required, we may either order the case retained on the district court docket pending the Board's action, . . . or order dismissal of the proceeding brought in the District Court." The Court then went on to say "An order of the Board will be subject to review by a United States Court of Appeals, with opportunity for further review in this Court on writ of certiorari . . . . If the Board's order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application." The Court then proceeded to order the district court suit to be dismissed as was the complaint in the Cunard case, where the Court used the words "exclusive preliminary jurisdiction." [31]

[fol. 231] This language seems to suggest that there might be circumstances under which the final determination of the Commission would be such as to lay a groundwork for a later antitrust suit, perhaps where there had been a

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[30] We note in the examiner's report, previously mentioned, the following: "It is further found and concluded that the requirement that both conferences concur in matters voted on by said conferences is authorized by the approved basic agreement, and therefore is not in violation of said Section 15."

[31] For a discussion of the difference between what is there called "primary exclusive jurisdiction" and "primary non-exclusive jurisdiction", see "Antitrust and Regulated Industries", 38 New York University Law Review, 604, 615.

complete and egregious failure even to attempt to comply with the Shipping Act.

On the other hand, in language which we have previously quoted, the Court in Cunard suggested that the intervening agreement there referred to "might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications." We would assume that if such action were taken by the Commission no antitrust proceedings would be in order.

We do not find it necessary to resolve this question as to whether there might ultimately arise out of the situation here presented a right to relief under the antitrust laws.[32] We hold that we should under the circumstances of this case, follow the action taken by the Supreme Court in Far East Conference and approve the dismissal of the action by the district court.

The judgment is affirmed.

[fol. 232]

In the United States Court of Appeals

For the Ninth Circuit

No. 18,926

Carnation Company, a corporation, Appellant,

vs.

Pacific Westbound Conference, Far East Conference and the Federal Maritime Commission, et al., Appellees.

Judgment—Filed and entered July 30, 1964

Appeal from the United States District Court for the Northern District of California, Southern Division.

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[32] The only possible reason for allowing the action to be retained on the district court docket would be to avoid a claim that antitrust action was barred by the statute of limitations. Since we hold that such an action cannot at this date be maintained, this reason is not applicable here.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[fol. 233] [File endorsement omitted]

No. 18926

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, Appellees.

APPELLANT'S PETITION FOR REHEARING—
Filed August 27, 1964

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No. 18926

In the United States Court of Appeals

For the Ninth Circuit

Carnation Company, a corporation, Appellant,

vs.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, and other named persons, Appellees.

Appellant's Petition for Rehearing

The opinion rejects appellees' broad claims and recognizes that "there might ultimately arise out of the situation here presented a right to relief under the antitrust laws". This results if the agreement under attack is not immunized under the Shipping Act. But dismissal is affirmed because it is said this question must first go to the Commission. We suggest that whether in *this* case this is required under the criteria of *Cunard* or *Far East Conference* deserves further consideration. We present this petition for rehearing so that the Court (a) may correct what are believed, with deference, to be errors of law appearing on the face of the opinion and (b) may reconsider the cause in the light of the correction of these errors. References to the Court's opinion are to the printed slip-sheet copies of the opinion.

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[fol. 236] I.

Errors of Law

1. The opinion (p. 24) states: "Under Sec. 18 of the Shipping Act if the Commission found that any rate was unjust or unreasonable it could prescribe a reasonable maximum rate", and that though "the Maritime Commission does not fix rates" it has "power * * * to set aside unjust and unreasonable rates". It also refers to filing "rates and charges with the Commission pursuant to Sec. 18 of the Shipping Act."

Section 18, before 1961, had no application to *foreign* commerce.[1] It applied only to "common carriers by water in interstate commerce".[2] However pervasive the *Act's* regulatory scheme may or may not be, it does not encompass *any* fixing of rates in *foreign* commerce by the Commission.[3] *Here* the scheme of regulation is only "a system

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[1] As to "foreign commerce" *FMB v. Isbrandtsen Co.*, 356 US 481, 490, pointed out: "No power to fix rates is granted to the Board." To "prescribe a reasonable maximum rate" is "to fix rates". *Empire State Highway Tr. Ass'n v. FMB*, 291 F2d 336 (Cir. Dist. Col.), c.d. 368 US 931, has pointed out the difference here between foreign and interstate commerce. A hall-mark of "fully regulated industries" that they are "forced to charge only reasonable rates approved by the appropriate commission" (*U.S. v. R.C.A.*, 358 US 334, 346) is wanting in this case.

[2] The Act in § 1 (46 U.S.C. § 801), carefully distinguishes between carriers "in foreign commerce" and "in interstate commerce". The distinction, as to § 18, is highlighted by the 1961 amendment which renumbered the old section applying to carriers "in interstate commerce" as subdivision "(a)" and added a new subdivision "(b)" applying to carriers "in foreign commerce and every conference of such carriers".

[3] We do not overlook that "unjust discrimination" is prohibited. Discrimination could result whether rates are reasonable or unreasonable. But no discrimination was claimed. The increase of which Carnation complains applied to all shippers of evaporated milk. We did not have to present, and did not present, the issue presented in the Commission proceeding No. 872 whether Agree-

of industry self-regulation" (p. 24) through *approved* agreements which *only* in this way, by force of § 15, are removed from operation of the antitrust statutes.[4]

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[fol. 237] 2. The opinion is saturated with a mistaken idea that the Commission can still approve the side agreement of which Carnation complains and thus eliminate the illegality. The error is repeatedly articulated by quotation from *Cunard,* 284 US 474. It is said (p. 18) that Congress contemplated that the agency would develop "considerable expertise" and so (by quotation from *Cunard*) "it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, *be approved or allowed to stand with modifications.*"[5] In immediate sequence it is said that the examiner has recommended approval of Agreement No. 8200 after amendment. Again, in conclusion (p. 28), repeating this quotation from *Cunard,* the opinion adds: "We would assume that if such action were taken by the Commission *no* antitrust proceedings would be in order."

The language of *Cunard* as used in *Cunard* was proper. The only relief *there* sought was *prospective,*—injunctive relief against carrying out an unapproved agreement,—and approval would sweep away any foundation for relief operating in future, or a cease-and-desist order would obviate need for an injunction. For the same reason *Far East Conference* properly followed *Cunard.* But here approval cannot have *retroactive* effect and wipe out a fully accrued cause of action for damages for past unlawful con-

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ment No. 8200 was being carried out "in a manner which makes it unjustly discriminatory or unfair".

[4] "*Approved* agreements are exempted from the antitrust laws." ***FMB v. Isbrandtsen Co.,*** note 1 above.

[5] This quotation is repeated at the end of note 10 on page 10, toward the bottom of p. 15, and in note 19 on p. 17.

duct[6] (*River Plate etc. Conf. v. Pressed Steel etc. Co.*, 227 F2d 60 (Cir 2)) and the Commission cannot award the equivalent of Clayton Act relief. So far as *this* case is concerned passing on the agreement is not an ingredient of any Commission authority because there is no authority for retroactive approval[7] or to award treble damages. The

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[fol. 238] court by taking jurisdiction in this action cannot "usurp" Commission authority for there is none to be usurped.

3. The Court's statement (p. 15) that on complaint the Commission can "award full reparations" under § 22 and on investigation "on its own motion" can "make similar orders" is in error as to reparations both (a) under the express provisions of § 22[8] and (b) in the sense that "full reparations" under the antitrust statutes include treble damages which the Commission cannot award.

4. As to "foreign commerce" the scheme of regulation by the *Act* is not all pervasive but, to the contrary, the

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[6] Indeed the PWC brief, note 31 p. 42, indignantly protested "We have never argued otherwise."

[7] The Commission cannot now, *as to the past*, use the *only* machinery which Congress provided as the means of permitting "a controlled system of agreements designed to *limit* competition." (Opinion p. 16) The "controlled system" was *only* one of approval in advance of action,—"*before* approval * * * *it shall be unlawful* to carry out in whole or in part, directly or indirectly, any such agreement" (§ 15). While it is true that the Shipping Act, like the Federal Aviation Act, is designed to change the prior competitive system as to *approved* agreement, we submit that likewise, as it was held in *Pan American World Airways, Inc. v. U.S.*, 371 US 296 under the Aviation Act, as to matters not brought under the Commission's power of action (rate fixing), the antitrust statutes still operate with full vigor where immunity has not been obtained in the only way provided for by Congress in the industry regulating statute.

[8] Quoted in Court's footnote 4. The Commission cannot make a money award where it investigates on its own motion.

scheme of the Act, as this Court itself at another point recognized, is in very large part "a system of industry self-regulation" (p. 24).[9] Accordingly, it becomes all the more important, in determining whether a claim is one for "exclusive primary jurisdiction", to heed the admonition of *United States v. Western Pacific R. Co.*, 352 US 59, 64

[fol. 239] "to adhere to the disinctions laid down in *Great Northern R. Co. v. Merchants Elevator Co.*, supra, which calls for a decision based on the particular facts of each case." The system of industry self-regulation was of *approved* agreements leaving *unapproved* agreements subject to operation of the antitrust statutes under which the Commission has *no* functions to perform. *Congress* determined how possible collision of the two regimes was to be avoided by providing a method of excluding the antitrust regime by approval. No other method will do.

The distinction to which the Court, with deference, failed to adhere in the process leading to its conclusion at p. 11 was that between a claim based upon asserted violation of a regulatory provision of the statute (not our case) or upon a claim for relief which could be obviated by Commission action (as in *Cunard* and *Far East*[10]), matters within the area fixed for Commission action, and a claim such as that presented by Carnation where the *only* concern with the

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[9] The statement in *Cunard*, 284 US 474, 480, that the Shipping Act bears a relation to water carriage like that of the Interstate Commerce Act to carriage by land is correct in the sense that each is the industry regulating statute for an industry. But the schemes of regulation differ. The Interstate Commerce Act is one of complete regulation with breadth of application and detail of provision which leaves nothing by way of regulations to the industry itself. The basic scheme of the Shipping Act is different, at least as to rates in *foreign* commerce, and is self-regulation under approved agreements supplemented by a minimum of prohibition of certain specified unfair practices.

[10] Or where, as there, full relief could be given by the Commission, by a cease-and-desist order.

Shipping Act is that there was no approval which excluded operation of the antitrust statutes.[11]

II.

The Particular Facts of This Case

However true it may be that the Shipping Act lists many standards which require more than ordinary familiarity with ocean transportation (p. 17) we believe the opinion it-

[fol. 240] self demonstrates that none of these are here involved.[12] In dealing with the specifics of this case the court notices only two questions in *this* case calling for determination:

(a) Whether the 1957 increase in rates was unlawful because put into effect by the parties "acting as alleged in

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[11] The distinction which the Supreme Court went out of its way to point out in *Panagra, Pan American World Airways, Inc. v. U.S.*, 371 US 296, that when the precise matter in issue did not fall within the area fixed for administrative action in applying the provisions of the industry regulatory statute there was room for full play of the antitrust statutes with their appropriate remedies.

[12] Nothing could make this clearer than this Court's own listing in footnote 20 of standards of unjustness, discrimination and reasonableness and its listing, by quotation from *Cunard* in footnote 7, of the considerations (familiar to experts but, so it is said, "generally unfamiliar to a judicial tribunal") necessary for application of these standards. We present no question calling for application of any such standards. We rely on an unapproved agreement which is no part of No. 8200. This case could not call upon the court to say whether any part of No. 8200 is good or bad, nor can the Commission saying that any part of it is good, modified or unmodified, have any retroactive effect to wipe out any part of prior antitrust violations.

Pan American World Airways, Inc. v. U.S., 371 US 296, *U.S. v. Western Pac. R. Co.*, 352 US 59, *Georgia v. Penn. R. Co.*, 324 US 439, and *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285, to cite only a few of the cases, make it clear that *all* questions with respect to a regulated industry do not fall within the primary jurisdiction doctrine merely because some do.

paragraph 18 above" (under a secret unapproved side agreement) and

(b) The legality of continuing the increase after PWC determined that it should be reduced but refused a reduction for want of concurrence by FEC because of an unapproved agreement with FEC.

The Court answers that Agreement No. 8200 provided for "joint fixing of rates by both conferences" (p. 2); that what defendants did might be found to be "wholly within and authorized by the filed and approved agreements" (p. 23); that "No. 8200 contemplated joint action in establishment of rates." We believe, with deference, that the Court is in error;[13] that even if there is language which might

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[fol. 241] possibly lend support to such a construction it is subject to the explicit reservation of the right of independent action in provision Second which applies to increase in rates as well as to veto of proposed reductions. But whether we are right or wrong about this, the question is, as the Court in fact came to treat it, a legal question of construction of an agreement and one for the courts not

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[13] The language first quoted at p. 23 is from the preamble only. The language next quoted—"with respect to the establishment or change of rates"—is, with deference, quoted out of context. It is in a sentence which refers only to the matters "coming before the *initial* meeting for consideration and action" and even then refers *not* to matters to be determined but only to the *way* in which each conference shall act i.e. each is to act "in accordance with the procedure prescribed by its respective Conference Agreement with respect to the establishment or change of rates." The opinion at p. 25 recognizes that this is the proper construction of the quoted language. This is made clear by paragraph 1 of the preamble which provides that "whenever reference is hereinafter made to action which is required or permitted to be taken by the Pacific Lines, such reference is intended to refer to *action* such as is required to effect the establishment or change of rates *pursuant to said Agreement No. 57,* as amended." Paragraph 2 is a like provision as to the Atlantic/Gulf Lines.

the Commission (*Great Northern R. Co. v. Merchants Elevator Co.,* 259 US 285), to be decided by the trial court in the first instance and not by this Court as a basis for sustaining the trial court's refusal to decide it. The question is not whether in the exercise of expert discretion an agreement should be approved but only what it means. It is a matter of construction that calls into play none of the considerations enumerated in *Cunard* as well understood (*sed quaere*) by a specially trained agency and generally unfamiliar to courts. It is a matter of every day diet of courts.[14]

As to the refusal to reduce the increased rate, it appears without contradiction that PWC determined the request for reduction should be granted, requested concurrence and when this was refused,[15] although No. 8200 Second expressly reserved the right of independent action,[16] withdrew the re-

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[fol. 242] quest "agreeably to the" improper side agreement alleged in paragraph 18 of the complaint.[17]

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[14] *Great Northern* is not to be put aside because there the question was one of construction of a railroad tariff and here it is one of construction of an agreement. Construction of agreements is certainly more a day-to-day concern with courts than is the construction of tariffs.

[15] After an exchange of 13 wires, if the factual showing is to be enlarged by the examiner's report.

[16] "Second" may not have been required by the Shipping Act before 1961 but it is clear that No. 8200 was not approved without it. Frank and explicit removal of it surely would have been a major modification requiring Commission approval and clandestine removal by an agreement to change only with concurrence should fare no better. The importance of the provision is pointed up by the 1961 amendment of the Shipping Act expressing the reservation of the right of independent conference action as a matter of Congressional policy.

[17] Compt. par. 25. Par. 26 further alleged that plaintiff's request "was declined by reason of the refusal of defendant FEC to concur" and that PWC statement that the action was by members of PWC was false.

It is said, however, that the "exercise of this right of independent action is discretionary"; that the Commission might hold this privilege could be waived in a particular case and that here PWC merely waived its right; that this was a single occurrence. It is noted in a footnote that on two occasions PWC acted independently and that this seems to negative an agreement never to act independently. The facts as alleged and undenied are to the contrary. But this does not present the question. The question is not whether PWC could act independently but whether PWC did *in fact* act independently or acted in pursuance of the unapproved conspiracy.[18] The latter is alleged and so far is not denied. If an issue should be made then we have the *classic* antitrust question, for jury determination, under §§ 1 and 2 of the Sherman Act,—was defendant's conduct the result of its independent determination of a business problem or the result of an agreement? No special agency expertise is required for the resolution of this question. It is a typical jury question in antitrust cases. And if this Court is going to indulge in the very dangerous practice of going outside the record before it, it should notice that only the Korean incident occurred before the proceeding before the Commission was instituted (the Kraft liner board matter came later) and that *it* was a single instance of independent action although there had been from 1953 through 1959, 1666 occasions of contemplated change with requests for concurrence (714 requests by FEC and 952 by PWC), no other changes had been made without concurrence, many

[fol. 243] were long delayed waiting concurrence, 161 were not made for want of concurrence and an additional 13 requests withdrawn. In such circumstances a single failure

[18] Any civil conspiracy case is one where what the defendants did any one of them could have done alone and without conspiring.

to honor the alleged secret side agreement does not negative its existence, or at least a jury could so find.[19]

Finally, if there is any possible question as to whether the unapproved side agreement was of the sort required to be approved the question is one of construction of the statute and of law for the courts (*Maryland & Va. Milk P. Ass'n v. U.S.*, 362 US 458, 468). As to past conduct there is no jurisdiction in the Commission to exercise its discretion to approve. With deference, the Court is in error in saying (p. 27) if a new agreement was made which required approval "exclusive primary jurisdiction is in the Board". To do what? Nothing it could do could breathe legality into what the statute (§ 15) declares to be illegal if done before approval.

It is respectfully submitted that the cause warrants further consideration by this panel or by the Court in banc.

Dated: August 27, 1964.

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William R. Birnie, Dunne, Phelps & Mills, Attorneys for Appellant.

Certificate

I certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Arthur B. Dunne, Counsel for Appellant.

[fol. 244] Proof of Service by Mail (omitted in printing).

[fol. 245] Clerk's Certificate to foregoing paper (omitted in printing).

[19] Conspirators are always at liberty not to honor their unholy alliance in any single instance.

[fol. 246]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Chambers, Pope & Jertberg, Circuit Judges.

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—September 28, 1964

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant filed August 27, 1964, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[fol. 247] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18926

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, Appellees.

OPINION ON PETITION FOR REHEARING—Filed September 28, 1964

Before Chambers, Pope and Jertberg, Circuit Judges.

Appellant's petition for rehearing discloses a failure to note the main thrust of the opinion which holds that appellant's action in the court below was properly dismissed on the ground that the matters complained of were within the primary jurisdiction of the Federal Maritime Commission.

Appellant has failed to note that we said: (immediately following the reference to footnote 16 on page 15 of the slip opinion) "In the exercise of its 'regulatory and remedial powers' to enforce the Act's 'pervasive regulatory scheme', it is for the Commission to pass upon the following questions: whether the defendants did or did not make certain agreements, whether those agreements, if made were such as to require Commission approval. . . . " Again we discuss this matter at great length (beginning at the middle of [fol. 248] page 22 of the slip opinion, which will be the paragraph preceding West Publishing Company Key No. 5) where we said among other things: "Cunard and Far East Conference, as we have noted, both hold that failure of approval does not affect the Commission's primary jurisdiction. But even if it did, the question would remain as to whether what defendants did amounted to agreements which required Commission approval. And that is something for the Commission to decide. If it should decide that defendants have been acting under agreements which should have been filed, but were not, the Commission under §22 of the Act, could adjudge a violation of the Act, as in Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n., 9 cir., 314 F. 2d 928. And, of course, the Commission, as we shall note hereafter, might find the conduct of the defendants in respect to the rates mentioned in the complaint was wholly within and authorized by the filed and approved agreements. But in passing upon these matters the Commission must necessarily employ a specialized judgment and a determination of fact, policy and law, not within the conventional experience of a judge or jury." The point there made was discussed, both before and after the quoted language, at considerable length.

In short, we believe that the petition for rehearing is predicated upon a misunderstanding of our opinion. The petition is denied.

Richard H. Chambers, Walter L. Pope, Wilbert D. Jertberg, United States Circuit Judges.

[fol. 249]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18926

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, FAR EAST CONFERENCE AND THE FEDERAL MARITIME COMMISSION, et al., Appellees.

CERTIFICATE OF CLERK, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Frank H. Schmid, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify this transcript of record in three volumes (volume one numbered from 1 to 125, volume two numbered from 1 to 72, and volume three numbered from 1 to 41) to be a full, true and correct copy of the entire record of the above entitled case in the said Court of Appeals, made pursuant to the request of counsel for the appellant Carnation Co., and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this sixth day of September, 1964.

(Seal)

Frank H. Schmid, Clerk.

[fol. 250]

SUPREME COURT OF THE UNITED STATES

No. 657—October Term, 1964

CARNATION COMPANY, Petitioner,

v.

PACIFIC WESTBOUND CONFERENCE, et al.

ORDER ALLOWING CERTIORARI—March 1, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court,
FILED
NOV 6 1964
JOHN F. DAVIS, CLE

In the Supreme Court

of the

United States

OCTOBER TERM, 1964

No. [redacted] 20

CARNATION COMPANY, a corporation, *Petitioner,* vs. PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons defendants, and Federal Maritime Commission, intervener, *Respondents.*	

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Appendices

TABLE OF AUTHORITIES

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STATUTES

All emphasis is ours unless otherwise indicated.

All record references (R) refer to pages except that where numbers are separated by a colon the first refers to a page and the second to a line on that page.

In the Supreme Court

of the

United States

October Term, 1964

No. ....

Carnation Company, a corporation,
Petitioner,

vs.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, and other named persons[1] defendants, and Federal Maritime Commission, intervener,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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1. The other respondents are the other defendants and appellees below. Since they are fully named in paragraphs 6-8 of the Complaint which is Appendix C to this petition (App. pp. 53-67 at 55-58) the names are not repeated here.

Petitioner, a shipper by common carrier by water in *foreign* commerce, sued in the United States District Court for the Northern District of California, Southern Division, to recover, from carriers and others and two conferences of carriers, treble damages based on a \$2.50 per ton tariff overcharge imposed, as an increase over the theretofore lawfully established rate, as a result of a conspiracy in violation of the antitrust statutes. On motions of defendants, before any answer was filed, and of The Federal Maritime Commission, intervener,[2] (R 23 ff, the action was dismissed *in limine* "on the grounds that primary jurisdiction of the action is in the Federal Maritime Commission" (Jud't, R 65), by reason of the Shipping Act of 1916. As in *McLean Trucking Co. v. U.S.*, 321 US 67, 79 ff (and other cases below) there was "a problem of accommodation" of an industry statute which contemplates "some diminution of competition" and possible "creation of monopolies", with a statute of general application and broad policy, the Sherman Act, making illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations". (Cf. the *Panagra Case—Pan American World Airways, Inc. v. U. S.*, 371 US 296, p. 32 ff below.)

On appeal the United States Court of Appeals for the Ninth Circuit affirmed the judgment of *dismissal* of the *action*. Petitioning for a writ of certiorari to review and correct that judgment plaintiff-petitioner respectfully shows:

I

OPINIONS BELOW

The memorandum opinion of the District Court (R 63) is not reported. It is reproduced in Appendix A hereto (App. p. 3).

The opinion of the United States Court of Appeals for the

2. The Commission did file an answer in which it was very careful *not* to deny any of the averments of the complaint. (R 36)

Ninth Circuit, (R 93, Appendix A, pp. 5-34) and its memorandum denying petitioner's petition for a rehearing, (R 123, Appendix A, pp. 35, 36) had not been reported as this petition went to the printer.

II

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked upon the ground that a federal question is presented which this Court has jurisdiction to review in that (a) the jurisdiction of the District Court was properly invoked as the action was one to recover treble damages arising under the Act of Congress of July 2, 1890, c. 647, 27 Stat. 209 as amended and particularly § 1 (the Sherman Antitrust Act, 15 USC §§ 1-7),[3] the Act of Congress of October 15, 1914, c. 323, 38 Stat. 730, as amended particularly § 4 (the Clayton Act, 15 USC §§ 12-27)[3] and Judicial Code §§ 1331 and 1337 (28 USC §§ 1331, 1337), (b) the action was dismissed by the District Court upon the asserted ground that primary jurisdiction was in the Federal Maritime Commission by reason of the Shipping Act of 1916, Act of Sept. 7, 1916, c. 451, 39 Stat. 728 as amended (46 USC § 801 ff)[3] and (c) the Court of Appeals affirmed on this ground.

The judgment of the Court of Appeals sought to be reviewed is dated July 30, 1964 (R 93, 121) and was entered on that day (R 92, 121). A petition for rehearing, filed within time, was denied on September 28, 1964 (R 122-124).

It is believed that Judicial Code § 1254(1) (28 USC § 1254(1)) confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

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3. The pertinent provisions of the statutes are set out in Appendix B hereto, App. p. 38 ff.

III

THE QUESTIONS PRESENTED AND REASONS FOR GRANTING OF THE WRIT

It was not questioned that the complaint stated a claim for damages from price fixing in violation of the antitrust statutes, if they stood alone.[4] But the defendant carriers were subject to the Shipping Act of 1916 and it was claimed that the facts relied on constituted a violation of that Act and that the sole remedy was under that Act. The Court of Appeals held that if there might be a remedy under the antitrust statutes still, before it could be invoked, there were matters which must be decided by the agency charged with administration of the Shipping Act, the Federal Maritime Commission. The questions presented are:

1. Have the antitrust statutes been repealed by the Shipping Act by implication as to conduct of carriers which are subject to the Shipping Act?

2. Where conduct in violation of the antitrust statutes also violates the Shipping Act is the only remedy of a party aggrieved under the Shipping Act and, if so, might he not then improperly be deprived of a right of trial by jury?

3. Where Congress, in an industry statute (here the Shipping Act) which applies to conduct which also falls within the anti-

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4. The claim (see p. 9 ff below) was that as a result of agreement between carriers in the Far East trade the rates for carriage from the Pacific Coast were increased $2.50 per ton and plaintiff was forced to pay the increased rate. It is settled that "price-fixing agreements are unlawful *per se* under the Sherman Act" (*U.S. v. Socony-Vacuum Oil Co.*, 310 US 150, 218; *White Motor Co. v. U.S.*, 372 US 253; *No. Pac. R. Co. v. U.S.*, 356 US 1, 5). The rule applies to rates of carriers where no special immunity can be found (*United States v. Trans-Missouri Freight Ass'n*, 166 US 290; *Georgia v. Penn. R. Co.*, 324 US 439, 456; *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 US 474, 480; *Isbrandtsen Co. v. U.S.*, 211 F2d 51, 57 (Cir. Dist. Col.), c.d. 347 US 990). The result is not different because the agreement was reached before the change in rate complained of was made (*Silver v. N. Y. Stock Exchange*, 373 US 341, note 5) nor because of the fact, if it be the fact, that the agreement may be one only for a veto power on change of rates (*Georgia v. Penn. R. Co.*, 324 US 439, 458).

trust statutes, has provided the means of accommodation of the two statutes and the test for determining application of the antitrust statutes, by providing in the industry statute that specified conduct is excepted from the antitrust statutes *when approved* by an administrative agency set up to administer the industry statute,[5] is not such approval the only way of denying full application of the antitrust statutes and complete availability of their remedies?

4. When the only possible issues involved in a claim for damages under the antitrust statutes are (a) whether an agreement to fix rates was made, (b) whether it was carried out to plaintiff's damage and (c) whether it was in fact not filed with and not approved by the Federal Maritime Commission, are not these classical antitrust issues to be tried by the court and which involve no questions for submission to the administrative agency charged with administration of the Shipping Act under the "primary jurisdiction" doctrine?

In deciding this cause adversely to petitioner the Court of Appeals has decided important questions of federal law concerning the operation of the antitrust statutes in fields of industry which have been subjected to some regulation by Congress[6] which have not been, but should be, settled by this Court (there is singular want of decisions on the question of accommodation when recovery of *damages* under the antitrust statutes is sought against members of a regulated industry), and has decided them in a

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5. Shipping Act, § 15, App. p. 43.

6. An important question in this case arises under the provision of Shipping Act § 15 for approval of certain agreements and thus exception from the antitrust statutes. The same question is presented under other industry statutes, for example under the Federal Aviation Act of 1958 (49 USC § 1301 ff) especially 49 USC §§ 1382 and 1384. These sections, adopted *after* the decisions in *Cunard*, 284 US 474 in 1932 and *Far East Conference*, 342 US 570 in 1952, were modeled on § 15 of the Shipping Act (*McManus v. C.A.B.*, 286 F2d 414, 419 (Cir. 2), c.d. 366 US 928).

way which is in conflict with applicable principles established by decisions of this Court. More specifically it is submitted:

(a) This action for treble damages for *past* conduct is not controlled by *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 US 474 and *Far East Conference v. United States*, 356 US 570. The reasoning and holding of those cases is limited to suspension of judicial relief in specie with *prospective* operation which will trench upon administrative action in areas committed by the industry statute to an administrative agency set up to administer the statutes, and do not apply, as the *Panagra Case, Pan American World Airways, Inc. v. U.S.*, 371 US 296 was at pains to point out (see p. 34 below), to prevent free play of the antitrust statutes and their remedies where this will not in fact conflict with the performance by the administrative agency of its proper functions. A court award of damages will no more interfere with the functioning of the Federal Maritime Commission than would an award of reparations by the Commission itself under Shipping Act § 22.

(b) The decisions of this Court (particularly after *Cunard*), dealing with accommodation of the antitrust statutes with industry regulatory statutes which provide for antitrust exemption on *approval as provided*, demonstrate that the Shipping Act *(absent Commission approval under § 15)* has not displaced the antitrust statutes (*Maryland & Virginia etc. Ass'n v. United States*, 362 US 458 and other cases noticed at p. 23 ff below).

(c) Under *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285 and cases which apply its doctrine, and under the "primary jurisdiction" doctrine as fixed particularly in *United States v. Western Pac. R. Co.*, 352 US 59, *United States v. R. C. A.*, 358 US 334, *California v. Fed. Power Commission*, 369 US 482 *Panagra*, above, and *United States v. Philadelphia Nat. Bank*, 374 US 321, there is no question which must be decided by any

administrative agency before the court can proceed to decision of petitioner's action.

(d) The Court of Appeals erred in failing to heed the warning of *U. S. v. Western Pacific*, p. 25 below, that the decision of application of the doctrine of primary jurisdiction must be "based on the particular facts of each case" and, with deference, woodenly applied the holding of *Cunard* and *Far East* to a situation so different that it called upon the *court* to decide a classical antitrust question.

It is further suggested that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision" in endeavoring to support *dismissal* before answer and the framing of issues in this action, arguing (particularly in the last portion of the opinion) that there are issues for Commission decision in the teeth of clear and undenied averments of the complaint, undenied even in the answer filed by the Commission (R36).

IV

STATUTES INVOLVED

The statutes involved are:

The Sherman Act, Acts of July 2, 1890, c 647, 26 Stat. 209; Aug. 17, 1937, c 690, Title VIII, 50 Stat. 693; July 7, 1955, c 281, 69 Stat. 282, §§ 1, 2 and 8 (15 USC §§ 1, 2 and 7);

The Clayton Act, Act of October 15, 1914, c. 323, § 4, 38 Stat. 731 (15 USC § 15); and

Shipping Act of 1916, Acts of Sept. 7, 1916, c. 451, 39 Stat. 728; July 15, 1918, c. 152, 40 Stat. 900 (46 USC § 801ff) [later amended Sept. 19, 1961, Pub. L. 87-254, 75 Stat. 522].

Since the provisions are lengthy their pertinent text is set out in Appendix B, App. p. 37 ff.

V

STATEMENT OF THE CASE

A. Proceedings Below

Carnation Company commenced this action against 2 steamship "conferences" of water carriers operating from the United States to the Far East, the members of those conferences and the Chairman of each conference, to recover treble damages under the Sherman Act and the Clayton Act for violations, by the defendants, of these acts.

The jurisdiction of the District Court was invoked under §§ 1 and 2 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, §§ 1 and 2, 15 USC §§ 1, 2), § 4 of the Clayton Act (Act of Oct. 15, 1914, c. 323, 38 Stat. 731, § 4, 15 USC §15) and §§ 1331 and 1337 of the Judicial Code (28 USC §§ 1331 and 1337). (R 9:3-9; see p. 3 above.)

All of the defendants, except one, before any other proceedings were had, appeared by motions to dismiss.[7] The Federal Maritime

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7. James A. Dennean, Chairman of the Far East Conference was not served and did not appear. Certain parties, joined as defendants by mistake, were dismissed by agreement.

The Far East Conference (FEC) and members moved to dismiss (R 23-27) upon the grounds that the complaint failed to state a claim upon which relief could be granted in that its charges constitute "violations of the provisions of the Shipping Act, 1916, as amended, which, to the extent of said acts and charges, supersedes the antitrust laws * * * the remedy * * * is that afforded by the Shipping Act, 1916, as amended" and the court "is without jurisdiction of the subject matter" in that agreements about rates are within the "exclusive jurisdiction of the Federal Maritime Commission"; the acts of defendants are subject to the jurisdiction of that Commission which is authorized to afford a remedy.

PWC, defendant Galloway, its chairman, and its members moved to dismiss (R 28-31) on the ground that the Shipping Act, 1916, as amended "provides the exclusive remedy for each and every wrong alleged by said complaint and that, as a consequence this Court is without jurisdiction to proceed as the matter is subject to the exclusive primary jurisdiction of the Federal Maritime Commission."

The Federal Maritime Commission moved to intervene "as a defendant * * * for the purpose of moving this court to dismiss" and moved to dismiss on the ground that the Shipping Act, 1916, "provides the exclusive remedy for the wrongs alleged in the complaint and therefore this honorable Court is without jurisdiction in this matter." (R 32-35)

Commission was permitted to intervene for the same purpose.[8]

With the motions the affidavit of Thomas Lisi, Secretary, Federal Maritime Commission was submitted. (R 38-56)

The court filed a memorandum opinion and order (R 63, App. p. 3) granting the motions to dismiss on the ground that the Shipping Act "provides a remedy for any violation of the Act", that "to carry out a rate agreement between carriers before approval of the Commission is an unlawful violation of the Act", the Supreme Court "has held that the antitrust laws are superseded to the extent that the Shipping Act provides a remedy" and authorities cited "are well-established precedents for applying the doctrine of exclusive primary jurisdiction to the Shipping Act in the present case."

Agreeably the court entered judgment (R 65) that

> "the court having filed herein a Memorandum of Opinion granting said Motions to Dismiss on the ground that primary jurisdiction of the action is in the Federal Maritime Commission:
>
> IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff's action be, and the same is hereby dismissed."

The plaintiff appealed. As appears above the Court of Appeals affirmed the judgment and denied a petition for rehearing (R 92 ff, App. p. 5 ff).

B. The Facts

The facts appear from plaintiff's complaint (R 6-22)[9] and are undisputed.[10] The only other material was the Lisi affidavit. (R 38-56) It is immaterial, except that Agreement 8200, the signifi-

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8. See footnote 7. It also filed an Answer (R. 36).

9. The complaint is printed in full in Appendix C hereto, App. p. 53.

10. The opinion of the Court of Appeals suggests the possibility of issues of fact but no such issues are made on this record. See footnote 2 above.

cance of which will be apparent, is set out in full (R 47-56)[11] The other Lisi material has to do only with certain proceedings before the Federal Trade Commission instituted on the Commission's own motion.[12]

These are the facts (App. C):

Carnation Company, was a shipper of evaporated milk from the Pacific Coast to the Philippine Islands by defendant common carriers, members of defendant Pacific Westbound Conference (PWC) (par. 4, 5, 29).[13]

Defendant common carriers to the Far East (par. 4, 6-8) fell into 3 groups, (1) those operating only from Pacific Coast ports (par. 6), (2) those operating only from the Atlantic Coast and/or Gulf of Mexico ports (par. 7), and (3) those operating both from Atlantic Coast and/or Gulf ports and from Pacific Coast ports (par. 8). Those operating from Pacific Coast ports were the only carriers providing general cargo and regular berth service on substantially regular routes and with regular sailings and were the only carriers by whom the plaintiff could ship to Manila (par. 11, 29).

Before January 1953 the carriers from Pacific ports associated themselves under Pacific Westbound Conference Agreement No. 57 to form the Pacific Westbound Conference for the purpose, among other things, of fixing the rates at which Conference members would serve the trade. Agreement No. 57 provided *that PWC should fix the rates.* The Agreement was filed with, and approved by, the United States Shipping Board under Shipping Act, 1916,

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11. Agreement 8200 is set out in Appendix D, App. p. 69.

12. Carnation appeared but asked no monetary relief and hence none could be awarded since the proceeding was on the Commission's own motion. Shipping Act § 22 (last paragraph), App. p. 50. The statement of the Court of Appeals of the effect of § 22 is not as full as it should be (App. p. 20) although § 22 is quoted in full in note 4.

13. The paragraph references are to the Complaint, App. C.

§ 15.[14] Thereafter those rates were fixed by PWC, except as stated below. Only carriers operating from Pacific Coast ports were members of PWC. (Par. 9) No carrier operating only from Pacific Coast ports was a member of the Far East Conference (FEC). (Par. 10)

Before January 1953 the carriers from the Atlantic and Gulf ports to the Far East formed the Far East Conference (FEC) for the purpose, among other things, of fixing rates to be charged by its members. Only carriers operating from Atlantic or Gulf ports were members of FEC. No carrier operating from only Atlantic and/or Gulf ports was a member of PWC. (Par. 13)

Carriers operating from Atlantic or Gulf ports and Pacific ports were members of both Conferences. (Par. 9, 13)

Trade from the Atlantic and Gulf to the Far East was competitive with that from the Pacific Coast. PWC and FEC served different trades that were competitive and their services were competitive except as restrained as stated below (Par. 16).

In November 1952 members of PWC and FEC entered into an agreement in writing, known as Agreement No. 8200, to meet and make rules for joint action by defendants which should include "machinery for the change of any rates, rules and regulation", but which expressly provided, in paragraph Second, that PWC retained the right of independent action in respect of rates.[15] This Agreement was filed with and approved by the Federal Maritime Board. (Par. 17)

In spite of the provisions of Agreements No. 57 and 8200 that PWC should be the rate fixing agency for its members the

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14. From time to time different agencies, by statute or executive order, have been charged with administering the Act. The present agency is the Federal Maritime Commission. By the use of "Commission" we refer to it and its predecessors.

15. With deference, the statement in the opinion of the Court of Appeals that Agreement No. 8200 provided "for the joint fixing of rates by both conferences" (App. p. 6; cf also the statements at pp. 29, 31) is not correct literally or in substance. See p. 40 below.

defendants, in January 1953, met at Santa Barbara, California, and "secretly and unlawfully associated themselves together and secretly and unlawfully combined, conspired and agreed to restrain commerce with foreign nations" and to fix the rates from Pacific Coast ports to the Far East, not as provided in Agreements No. 57 and 8200, and so conspiring agreed not to disclose to shippers information with respect to rate changes, that defendants, and not PWC alone, should fix the rates for PWC members but that the rates so fixed should "then be given out and to shippers by defendant PWC falsely pretending to act as such and under Agreement No. 57", that these rates would be adhered to and that PWC would make no change in any rate without the concurrence of FEC, except rates on a "list of initiative items" which did not include evaporated milk until May, 1961. (Par. 18, 19) This association, combination and conspiracy was never submitted to the Commission and was never approved (par. 20).

In 1951 PWC, the lawful rate fixing agency under Agreement No. 57, fixed the rate for evaporated milk from Pacific Coast ports to the Philippine Islands. The defendants, under the secret and unapproved side agreement above stated, increased this rate by $2.50 per ton effective May 1, 1957, PWC announced the increase and, over plaintiff's protest, put it into effect, as though it were an increase by PWC. This rate was kept in effect until May 7, 1962. Meanwhile, in November 1957, plaintiff requested PWC to reduce the rate by $2.50 per ton to the rate it had established before May 1, 1957. PWC determined that the request should be granted but would not reduce the rate without the concurrence of FEC. FEC declined concurrence *and for that reason* the rate was not, in fact, reduced until May 7, 1962, when the rate was reduced to the rate originally fixed by PWC. (Par. 21-28)

From May 1, 1957 through May 7, 1962 plaintiff was forced to ship its evaporated milk to Manila by members of PWC and to pay the increase in rate of $2.50 per ton. It did not pass this

inrcease on and, as a result, suffered actual damage in the sum of $343,276.70. (Par. 29, 30)

In 1959 the Commission instituted an investigation into Agreement 8200 and conduct in relation to it. Carnation Co. intervened but, quite obviously, no issues here presented could be concluded there,—the Commission is given no power to adjudicate antitrust questions as such,—Carnation did not ask for reparations and monetary relief could not be awarded (see note 12 above), much less any relief by way of treble damages. The antitrust violation, price fixing, is a *per se* violation. Carnation is not here concerned with questions of discrimination, reasonableness or the like.

VI

ARGUMENT FOR ALLOWANCE OF THE WRIT

It is readily apparent that defendants' conduct can not be squared with the Sherman Act (see note 4, p. 4 above) nor with Shipping Act § 15. In such circumstances does one statute give way to the other, in whole or in part, or do both apply in full force except only that a private suitor can not elect more than one remedy and can not have more than a single satisfaction of his rights?

It is a self-evident truism that for the solution of this problem of accommodation the materials are the statutes and the nature and force of the policies underlying them.

A. The Antitrust Laws and Their Policy

The terms and policies of the antitrust laws, so far as material here, are comparatively easy of statement.

Sherman Act § 1 makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations". Clayton Act § 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden

in the antitrust laws may sue therefor in any district court of the United States * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Northern Pac. R. Co. v. U. S., 356 US 1, 4, shortly and sweepingly stated the policy of the Sherman Act:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestricted interaction of competitive forces would yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even where that premise is open to question, the policy unequivocally laid down by the Act is competition."[16]

The underlying policy gives the statute such force that "immunity from the antitrust laws is not lightly implied".[17] In this context this Court has said that its "function is to see that the policy entrusted to the courts is not frustrated by an administrative agency." (*California v. Fed. P. Com'n*, 369 US 482, 485, 490)

Moreover, the Clayton Act § 4 private right of action for treble damages is designed to do more than merely provide compensation for a wrong suffered by a private suitor. It has a larger role

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16. *U. S. v. Philadelphia Nat. Bk.*, 374 US 321, after quoting *California v. Fed. Power Com'n*, 369 US 482, 485 for the proposition that "[i]mmunity from the antitrust laws is not lightly implied" adds "This canon of construction which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here."

17. *U. S. v. Philadelphia Nat. Bk.*, 374 US 321, quoting this statement (see note 16 above), said that "[i]t is settled law". *Allen Bradley Co. v. Local Union No. 3*, 325 US 797, 809, referring to the antitrust statutes, and holding the union exemption did not apply, points out: "It must be remembered that the exemptions granted to the unions were special exceptions to a general legislative plan."

of support of the underlying policy of the Sherman Act. The Clayton Act remedy "*supplements Government enforcement of the antitrust laws.*" (*U. S. v. Borden Co.*, 347 US 514, 518) The "punitive two-thirds portion of a treble-damage antitrust recovery" is "extracted from the wrongdoers as *punishment* for unlawful conduct". (*Commissioner v. Glenshaw Glass Co.*, 348 US 426, 427, 431[18]) "The treble-damage action was intended *not* merely to redress injury to an individual through the prohibited practices, *but to aid in achieving the broad social object of the statute.*"[19] (*Karseal Corp. v. Richfield Oil Corp.*, 221 F2d 358, 365 (Cir. 9)[20]). To look upon the question here presented as merely whether the plaintiff should seek a compensatory award under this Act or under the Shipping Act misses entirely this consideration of underlying policy and purpose.[21]

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18. Cf. *Powell v. St. Louis Dairy Co.*, 276 F2d 464 (Cir. 8); *No. Carolina Theatres, Inc. v. Thompson*, 277 F2d 673 (Cir. 4).

19. "The grant of a claim for treble damages to the person injured was for the purpose of *multiplying the agencies which would help enforce the antitrust laws* and therefore make them more effective." (*Kinnear-Weed Corp. v. Humble etc. Co.*, 214 F2d 891, 893 (Cir. 5), c.d. 348 US 912)

20. The case was quoting *Fanchon & Marco v. Paramount Pictures*, 100 F Supp 84, 88, (S.D. Cal.) aff'd 215 F2d 167 (Cir. 9), c.d. 348 US 912. *Karseal* further said that "The Clayton Act was part of the overall plan and the 'right of the injured party to recover damages *was intended to provoke greater respect for the Act* * * *', Maltz v. Sax, 7 Cir., 1943, 134 Fed. 2d 2, 5, cert. den. 319 U.S. 772". See the very strong opinion in *Monarch L. Ins. Co. v. Loyal etc. Co.*, 326 F2d 841 (Cir. 2), c.d. 376 US 952, quoting *Karseal*.

21. *Lawlor v. Nat. Screen Serv. Corp.*, 349 US 322, 329, speaks of "the *public interest in* vigilant enforcement of the antitrust laws *through the instrumentality of the private treble-damage action.*"

Bruce's Juices v. American Can Co., 330 US 743, 751, speaking of treble-damage actions in connection with violations of antitrust statutes said that such an action "stimulates one set of private interests to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the government of cost of enforcement. * * * It is clear Congress intended to use private self-interests as a means of enforcement and to arm injured persons with private means to retribution when it gave to an injured party

Still the private recovery has its other side. Under the antitrust statutes, once a case of damage is made, the trebling of the amount found follows "automatically" (*Clark Oil Co. v. Phillips Pet. Co.*, 148 F2d 580, 582 (Cir. 8), c.d. 326 US 734). "In this respect neither the jury nor either court had any discretion." (*Bigelow v. R. K. O. Radio Pictures*, 150 F2d 877, 883 (Cir. 7), rev. on other grounds.) By consequence, and *Flintkote Co. v. Lysfjord*, 246 F2d 368, 397 ff (Cir. 9), c.d. 355 US 835, cited in note 21, so holds, if plaintiff receives anything less than his damages *trebled* he does not receive "full satisfaction of his claim"; full damages trebled, as to plaintiffs, is the "whole to which they are entitled."[22] This

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a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee."

Flintkote Co. v. Lysfjord, 246 F2d 368, 398 (Cir. 9), c.d. 355 US 835, said: "Further, a niggardly construction of the treble damage provisions would do violence to the clear intent of Congress. The private antitrust action is an important and effective method of combatting unlawful and restructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction."

In *Mach-Tronics, Inc. v. Zirpoli*, 316 F2d 820, 828 (Cir. 9), the court stated: "The provision for the recovery of treble damages by an injured party was an *important and significant feature of the entire antitrust program.*" and quoted part of the material which we have quoted from *Karseal* and from *Flintkote*.

Weinberg v. Sinclair Refining Co., 48 F Supp 203, 205 (E.D. N.Y.) and *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F Supp 796, 801 (S.D. Cal.) both refer to the treble-damage action as supplying "an ancillary force of private investigators to supplement the Department of Justice in law enforcement."

22. Three cases dealing with a parallel problem, the extent to which jurisdiction of state courts to deal with disputes arising out of labor relations survives the federal legislation dealing with labor relations, are significant.

United Construction Workers etc. v. Laburnum Const. Corp., 347 US 656;
International Association etc. v. Gonzales, 356 US 617; and
International Union etc. v. Russell, 356 US 634.

Their significance is the importance they attach to the circumstance that the plaintiff could get *full recovery* (including *punitive* damages) only in the

is pointed out because the Court of Appeals seemed to think Shipping Act § 22 bolstered the Court's holding because under § 22 the Commission could "award full reparations" (App. p. 20). It could not award the treble damages to which petitioner is entitled under the Clayton Act.

B. Shipping Act, 1916[23]

This Act has 3 principal features, (a) provisions regulating the industry and prohibiting certain conduct, (b) a provision authorizing conference agreements and exempting them from the operation of the antitrust statutes *when approved by the administrative agency*[24] and (c) the creation of an agency to administer the statute.

In respect of the first of these 3 features, a matter of significance in this case, *Congress sharply distinguished between interstate and foreign commerce.*[25] "The regulation of water carriers in the *foreign* trade of the United States is substantially different from

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state courts, as a basis for holding that the state courts were not ousted of jurisdiction because the conduct complained of was an unfair labor practice. In *Russell* the court said

> "Punitive damages constitute a well-settled form of relief under the law of Alabama when there is a willful and malicious wrong. To the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts. The power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board. In *Laburnum* we approved a judgment that included $100,000.00 in punitive damages."

23. We deal with it as it read before the 1961 amendments (see App. B).

24. Shipping Act § 15, App. p. 41 ff.

25. The Act, by careful definition in § 1 (46 USC § 801) makes clear the sharp distinction it is making between "foreign commerce" and "interstate commerce". (App. p. 39) The Court of Appeals overlooked this in its use of § 18 in its opinion, App. p. 30. That section applied only to *interstate* commerce and is in marked contrast with the *foreign* commerce *provision.* There was no power to fix rates in *foreign* commerce. *FMB v. Isbrandtsen,* 356 US 481, 490.

the regulation of carriers in our *domestic* trades."[26] For our purpose perhaps the principal distinction is that with respect to *foreign* commerce (unlike *interstate* commerce) the statute did *not* itself undertake direct broad regulation of rates *nor* confer upon the agency charged with administration of the statute broad power to deal with rates in *foreign* commerce.[26]

The provisions of the statute applying to *foreign* commerce, because they apply to *all* common carriers, are susceptible of summary statement.[27] The statute forbids certain specific and limited improper practices.[28] There is no provision for fixing rates in *foreign* commerce (see note 25) and the Act deals with *foreign* commerce primarily by allowing industry self-regulation through Commission approved agreements. The pivotal section is 15 (App. p. 41 ff). To insure the accommodation of this scheme with that of the antitrust statutes § 15 makes Commission approved agreements lawful and provides:

> "Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of

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26. *Empire State etc. Ass'n v. F. M. B.*, 291 F2d 336, 341 (Cir. Dist. Col.), c.d. 368 US 931. See note 25 above.

27. Compare the summary statement in *Fed. Maritime Com'n v. Isbrandtsen Co.*, 356 US 481, 490 ff.

28. The statute forbids paying or allowing "deferred rebates" (§ 14 First) and the use of "fighting ships" (§ 14 Second), has a series of provisions designed to prevent preferences and discrimination in providing service and requires that there be established and observed "just and reasonable regulations and practices" relating to the handling of property (§ 17). It contains only 2 provisions dealing expressly with rates: (a) no common carrier by water in foreign commerce shall demand or collect any rate which "is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States" (§ 17) and (b) obtaining carrier service at less than the regular rate by fraudulent means or by "any other unjust or unfair device or means" is prohibited (§ 16 and § 16 Second). Neither provision is involved in this case.

sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."[29]

Only the application and effect of this provision,—more properly failure to obtain the exception provided for,—is involved in petitioner's claim. No other regulatory provisions or exercise or want of exercise of regulatory powers of the Commission are drawn in question.[30] *This* case does *not* call for application of any assumed standard "whose application requires more than ordinary familiarity with ocean transportation" as the Court below argued. (App. p. 23)[31] This provision of § 15 is the machinery which Congress has provided for working the adjustment of the two statutory schemes which have such diverging underlying considerations and objectives. This machinery was not invoked to exclude operation of the antitrust statutes. Unlike the situation in *Cunard* and *Far East Conference* approval now will not cure the past wrong of which Carnation complains. With deference, failure to appreciate this is the root of the error of the Court of Appeals.[32] (And see p. 35 ff below.) If what was done violated the

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29. Quoted from 46 USC § 812. These sections of Title 15 USC include Sherman Act § 1, and Clayton Act § 4.

30. Even if petitioner could ask for relief under § 22 it has not elected to do so and submits that it cannot be forced to do so. See footnote 12 above dealing with the failure of the Court of Appeals fully to state the effect of § 22. Nor is the Court's statement with respect to enforcement of orders of the Commission (App. p. 20) entirely accurate, particularly in its failure to notice the provisions of § 30 (App. p. 51) in respect of orders for the *payment of money*.

31. Nothing in this case calls for determination of what would have been a "reasonable" rate. The only claim is based on collection of an illegal charge of $2.50 per ton in excess of the only *lawfully* fixed rate. No such question is here posed as was attempted in *Keogh v. C. & N. W. Ry. Co.*, 260 US 156.

32. The opinion seems saturated with a mistaken idea that the Commission can still approve the side agreement of which Carnation complains and thus eliminate the illegality. The error is repeatedly articulated by quotation from *Cunard*, 284 US 474. It is said (App. pp. 22, 23) that

antitrust statutes unless approved under § 15, and if there wa no approval, the antitrust statutes applied *and this includes th remedies they provide.* (*U.S. v. Borden Co.,* 308 US 188 an cases below at p. 23 ff.) There is no provision for *partial* exemptio if there is no approval. The opinion speaks of "a complete an egregious failure even to attempt to comply with the Shippin Act" (App. p. 34). But the Act does not contemplate degree of failure to comply. There is either approval which excepts con duct from the provisions of the antitrust statutes or there is no

C. There Is No Problem of Proper Accommodation of the Tw Statutes in This Case

The accommodation of two statutes having different underlyin policies and different effects can be accomplished in a variety o ways, and the accommodation may or may not be expressed b the legislature.

Congress contemplated that the agency would develop "considerabl expertise" and so (by quotation from *Cunard*) "it is not impossible tha although an agreement be apparently bad on its face, it properly migh upon a full consideration of all the attending circumstances, *be approve or allowed to stand with modifications.*" (This quotation is repeated at th end of note 10, and at App. p. 20, and in note 19.) In immediate sequen it is said that the examiner has recommended approval of Agreement N 8200 after amendment. Again, in conclusion (App. p. 34), repeating th quotation from *Cunard,* the opinion says: "We would assume that if suc action were taken by the Commission *no* antitrust proceedings would b in order."

The language was proper in *Cunard*. The only relief *there* sought w *prospective,*—injunctive relief against carrying out an unapproved agre ment,—and approval would sweep away any foundation for relief opera ing in the future, or a cease-and-desist order would obviate need for a injunction. For the same reason *Far East Conference* properly followe *Cunard*. But here approval can not have *retroactive* effect and wipe out fully accrued cause of action for damages for past unlawful conduct (*Riv Plate etc. Conf. v. Pressed Steel etc. Co.,* 227 F2d 60 (Cir 2)) and th Commission can not award the equivalent of Clayton Act relief. So far a *this* case is concerned passing on the agreement is not an ingredient of a Commission authority because there is no authority for retroactive approv or to award treble damages. The court can not "usurp" Commissio authority for there is none to be usurped.

A later statute may expressly repeal an earlier statute in whole or in part. There is no express provision in the Shipping Act for repeal, in whole or in part, of any of the antitrust statutes.

What is much the same, a later statute, by force of its own expressed provisions, without other intervention or action, may except specified things (persons or conduct) from the operation of an earlier statute. No such effect is claimed for any provision of the Shipping Act.

Although there is no express repeal the provisions of two statutes may be so "absolutely irreconcilable"[33] that they can not co-exist; that the later provisions if given effect, as to the earlier statute "render its provisions nugatory."[34] There is said to be repeal by implication. The rule here is stated by *U.S. v. Philadelphia Nat. Bk.*, 374 US 321:

> "No express immunity is conferred by the [Bank Merger] Act. *Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored*[35] and have only been found in cases of *plain repugnancy* between the antitrust and regulatory provisions. Two recent cases, *Pan American World Airways, Inc. v. U.S.*, 371 US 296, 9 Led 2d 325, 83 S Ct 476, and *California v. Federal Power Com.*, 369 US 482, 8 Led 2d 54, 82 S Ct 901, illustrate this principle."[36]

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33. *U.S. v. Greathouse*, 166 US 601, 605.

34. *Texas P. R. Co. v. Abilene Cotton Oil Co.*, 204 US 426, 437.

35. At this point, in its footnote 28, the Court collects 18 of its own decisions beginning with the *Trans-Missouri Freight Association Case*, 166 US 290, 314 and coming down through *Silver v. New York Stock Exchange*, 373 US 341.

36. In *Georgia v. Penn. R. Co.*, 324 US 439, 456 where the basis for relief was price fixing by carriers in violation of the antitrust statutes this Court said:

> "*Regulated industries are not per se exempt from the Sherman Act.* United States v. Borden Co. 308 US 188, 198 et seq., 84 L ed 181, 190, 60 S Ct. 182. It is true that the Commission's regulation of carriers has greatly expanded since the Sherman Act. See Arizona Grocery Co. v. Atchison, T. & S.F. R. Co., 284 US 370, 385, 386,

Although differently phrased the respondents argued below a doctrine of "supersession" which is really repeal by implication. Since the Court of Appeals does not rest on any theory of repeal by implication this can be passed without further comments except to notice two attempted variations on the theme which this Court has rejected: A statutory administrative remedy certainly does not supersede a judicial remedy where it is not an equivalent (*Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 US 84; compare note 22 above)[37] and agency approval *for purposes of a regulatory statute,* where no power has been given to adjudicate antitrust issues or to exempt, will not exclude operation of the antitrust statutes and their remedies.

> *United States Alkali Export Ass'n v. U. S.*, 325 US 196;
> *U. S. v. R. C. A.*, 358 US 334;
> *California v. Fed. Power Com.*, 369 US 482;
> *U. S. v. The Philadelphia Nat. Bk.*, above;
> *U. S. v. First Nat. Bk. etc. of Lexington,* 374 US 824.

Finally there are some industry regulatory statutes which, like the Shipping Act, have conferred upon the agency created to administer the statute some power to pass upon antitrust issues in the sense that the agency, by approval, can grant immunity from the antitrust statutes. The effect of failure to obtain such approval has been settled.

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76 L ed 348, 353, 354, 52 S Ct 183. But it is elementary that repeals by implication are not favored. Only a *clear repugnancy* between the old law and the new results in the former giving way *and then only pro tanto to the extent of the repugnancy.* United States v. Borden, supra, (308 US 198, 199, 84 L ed 190, 191, 60 S Ct 182)."

37. We are not to be understood as saying that if the administrative agency can give the relief sought that excludes judicial relief. There can well be dual and parallel remedies. (*U. S. v. W. T. Grant Co.*, 345 US 629. Cf.*Gt. Northern R. Co. v. Merchants Elevator Co.*, 259 US 285 and *United States Alkali Exp. Ass'n*, below.)

U.S. v. Borden Co., 308 US 188;

U.S. v. Socony-Vacuum Oil Co., 310 US 150, 226;

McLean Trucking Company v. U.S., 321 US 67;

Maryland & Virginia, etc. Ass'n v. U.S., 362 US 458;

Isbrandtsen v. U.S., 211 F2d 51, 57 (Cir. Dist. Col.), c.d. 347 US 990;

Chicago & N.W. Co. v. Peoria & Pekin etc. Co., 201 F Supp 241 (So. Dist. Ill.), aff'd 319 F2d 117 (Cir. 7), c.d. 375 US 969.

The holdings of these cases is shortly summarized in *California v. FPC,* 369 US at 485, the court referring to *Maryland & Virginia etc. Ass'n,* above, as follows:

> "We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nevertheless granted an overall inclusive one."

United States v. Socony-Vacuum Oil Co., above, makes it clear that exemption from the antitrust statutes under such statutes can be obtained only through affirmative and effective action. Claimed acquiescence by government employees in the conduct in question could provide no immunity from the antitrust laws for *"Congress has specified the precise manner and method of securing immunity. None other would suffice." Isbrandtsen Co. v. U. S.,* 211 F.2d 51, 57 (Cir. Dist. Col.), c.d. 347 US 990 goes no farther than these cases but applies their reasoning to a Shipping Act case.

The doctrine of these cases is disposed of by the Court of Appeals by the simple process of ignoring it upon the ground, as best we can read the opinion, that determination of whether the exempting approval was given is not a justiciable but an administrative question and though it is alleged, and not denied, that approval was not given the suit must be dismissed because the Commission, though it is careful not to say so in its answer, might rule that approval had been given or was not necessary;

that though whether an exemption from the antitrust statutes has been given is surely an antitrust question (cf. *California v. FPC*, p. 31 below),—do the antitrust statutes apply,—and on such questions courts should not defer to administrative agencies (*California v. FPC*, above) still here because of a different decision of a different question in *Cunard* and *Far East Conference* the result is otherwise and primary jurisdiction is with the Commission to determine whether the courts have jurisdiction.

D. Accommodation of the Functions of Courts and Commission Does Not Require Dismissal of This Action

The primary jurisdiction doctrine is one that accommodates the action of courts and administrative agencies so that court action will not embarrass agency action upon administrative matters.[38] For convenience we deal with it somewhat at length, by quotation of this Court's language, because when properly understood it is clear that its use in *Cunard* and *Far East Conference*, however proper there, is no justification for reliance on it here.

The primary jurisdiction cases are cases where under the same or different statutes, an agency and the courts could have functions to perform which touch the same matter. Here the "court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other" (*U. S. v. Morgan*, 307 US 183), and the problem is to find a "mode of accommodating the complementary roles of courts and administrative agencies in the enforcement of law"

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38. Often in decisions, as in *U. S. v. The Philadelphia Nat. Bk.*, above, and *U. S. v. R. C. A.*, above, both doctrines of repeal by implication and primary jurisdiction are considered. In some cases the emphasis is largely on discussion of the primary jurisdiction doctrine.

In *The Philadelphia Nat. Bk.* case the court said that "*the considerations that militate against finding a repeal of the anti-trust laws by implication* from the existence of a regulatory scheme *also argue persuasively against attenuating, by postponing, the courts jurisdiction to enforce those laws.*"

(*Far East Conference v. U. S.*, 342 US 570, 575). The doctrine is not one designed to cut down rights or reduce the ultimate relief to which a party is entitled. (Cf. *Far East Conference,* p. 37 ff below.)

Consideration of the primary jurisdiction doctrine must start with the *caveat* of *U. S. v. Western Pac. R. Co.*, 352 US 64, 69:

> "No fixed formula exists for applying the doctrine of primary jurisdiction. *In every case the question is whether the reasons for the existence of the doctrine are present* and whether the purposes it serves will be aided by its application in the particular litigation. * * * We adhere to the distinctions laid down in *Great Northern R. Co. v. Merchants Elevator Co.*, supra, which calls for *a decision based on the particular facts of each case.*"

Secondly, there must be put to one side situations where an administrative agency alone can act. The distinction was pointedly made in *United States v. Western Pac. R. Co.*, 352 US 59, 63:

> "The doctrine of primary jurisdiction, like the rule of requiring exhaustion of administrative remedies, is concerned with promoting *proper relationships between the courts and administrative agencies* charged with particular regulatory duties. '*Exhaustion*' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. '*Primary jurisdiction*', on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of and administrative body; in such a case the judicial process is *suspended* pending *referral* of such issues to the administrative body *for its views.* General American Tank Car Corp. v. El Dorado Terminal Co., 308 US 422, 433, 84 L ed 361, 370, 60 S Ct 325."

A leading statement is that of *U. S. v. R. C. A.*, 358 US 334, 346, where the court said of the "primary jurisdiction doctrine":

"The doctrine originated with Mr. Justice (later Chief Justice) White in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075. *It was grounded on the necessity for administrative uniformity,* and, in that particular case, for maintenance of uniform rates to all shippers. A second reason for the doctrine was suggested by Mr. Justice Brandeis in Great Northern R. Co. v. Merchants Elevator Co., 259 US 285, 291, 66 L ed 943, 946, 42 S Ct 477, where he pointed to the need for administrative skill 'commonly to be found only in a body of experts' in handling the 'intricate facts' of, in that case, the transportation industry.

"Thus, when questions arose as to the applicability of the doctrine to transactions allegedly violative of the antitrust laws, particularly involving *fully regulated industries* whose members were *forced to charge only reasonable rates approved by the appropriate commission,* this Court found the doctrine applicable. [39] United States v. Pacific & A. R. & Nav. Co., 228 US 87, 57 L ed 742, 33 S Ct 443; Keogh v. Chicago & N. W. R. Co. 260 US 156, 67 L ed 183, 43 S Ct 47; United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247; Georgia v. Pennsylvania R. Co. 324 US 439, 89 L ed 1051, 65 S Ct 716; Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492. At the same time this Court carefully noted that the doctrine did *not* apply when the action was only for the purpose of dissolving the conspiracy through which the allegedly invalid rates were set, for in such a case there would be no interference with rate structures, or a regulatory scheme. United States v. Pacific & A. R. & Nav. Co. 228 US 87, 57 L ed 742, 33 S Ct 443, and Georgia v. Pennsylvania R. Co. 324 US 439, 89 L ed 1051, 65 S Ct 716, both supra. The decisions sometimes emphasized the need for administrative uniformity and uniform

39. We have pointed out above that in this case there is not and could not be as to *foreign* commerce any question of "reasonable rates approved by the appropriate commission".

rates, Keogh v. Chicago & N. W. R. Co. 260 US 156, 67 L ed 183, 43 S Ct 47, supra, while at other times they emphasized the need for administrative experience in distilling the relevant facts in a complex industry as a foundation for later court action. United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247, supra, and Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492, supra, *as explained in* Federal Maritime Board v. Isbrandtsen Co. 356 US 481, 497-499, 2 L ed 2d 926, 937, 938, 78 S Ct 851."

In *Great Northern R. Co. v. Merchants Elevator Co.,* 259 US 285, 291, in language which has been frequently quoted, and which was relied on in *Cunard* itself, it was said that preliminary resort to the Commission

> "is required because the inquiry is essentially one *of fact and of discretion in technical matters and uniformity can be secured only if its determination is left to the Commission.*"[40]

United States v. Western Pac. R. Co., 352 US 59, 64 said:

> "In the earlier cases emphasis was laid on the *desirable uniformity* which would obtain if initially a specialized agency passed on *certain* types of administrative questions. See Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 US 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed."

United States v. Philadelphia Nat. Bk., above, at p. 353, said:

> "We note finally, that the doctrine of 'primary jurisdiction' is not applicable here. That doctrine requires judicial abstention in cases where *protection of the integrity of a regulatory scheme* dictates *preliminary* resort to the agency which administers the scheme. See Far East Conference v United States, 342 US 570, 96 L ed 576, 72 S Ct 492; Great Northern R. Co. v. Merchants Elevator Co. 259 US 285, 66 L ed 943,

40. *Held,* that where the question was of construction of a tariff it was one of law and resort to the Commission was *not* required.

42 S Ct 477; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv L Rev 436, 464 (1954). *Court jurisdiction is not thereby ousted,* but only postponed. See General American Tank Car Corp. v. El Dorado Terminal Co. 308 US 422, 433, 84 L ed 361, 370, 60 S Ct 325; Federal Maritime Board v. Isbrandtsen Co. 356 US 481, 498, 499, 2 L ed 2d 926, 937, 938, 78 S Ct 851; 3 Davis, Administrative Law (1958), 1-55. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies, the present action would not be barred for the agency proceeding was completed before the antitrust action was commenced. Cf. United States v Western P. R. Co. 352 US 59, 69, 1 L ed 2d 126, 135, 77 S Ct 161; Retail Clerks International Asso. v. Schermerhorn, 373 US 746, 756, 10 L ed 2d 678, 685, 83 S Ct 1461. We recognize that the practical effect of applying the doctrine of primary jurisdiction has sometimes been to channel judicial enforcement of antitrust policy into appellate review of the agency's decision, see Federal Maritime Board v Isbrandtsen Co. 356 US 481, 2 L ed 2d 926, 78 S Ct 851, supra; cf. D. L. Piazza Co. v West Coast Line, Inc. 210 F2d 947 (CA2d Cir 1954), or even to preclude such enforcement entirely *if* the agency has the power to approve the challenged activities, see United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247; cf. United States v. Railway Express Agency, Inc. 101 F Supp 1008 (DC D Del 1951); but see Federal Maritime Board v Isbrandtsen Co. 356 US 481, 2 L ed 2d 926, 78 S Ct 851, supra."

We can now repeat with confidence what was said above: The primary jurisdiction doctrine is not one to reduce either the rights or remedies of a party but one which, where it applies, provides only a calendar and, as *California v. FPC,* below, holds, is no excuse for abnegation by a court of its proper functions.

It should result, *and it has resulted,* that where the reasons for application of the doctrine are not present the court *must* proceed

in ordinary course with its regular business. (*California v. Fed. Power Com'n,* p. 31 below.) As *Abilene* is the origin of the doctrine, the leading case on the limitations of the doctrine is the frequently cited and quoted case, *Great Northern R. Co. v. Merchants Elevator Co.,* p. 27 above. That, like this, was an overcharge case. The question was one of construction of a tariff, not calling for any expert appraisal of complicated accounting data (as in *U. S. v. Western Pac. R. Co.,* above[41]), and *was one of law.* No resort to the Commission was required in order to obtain uniformity. (See acc. *W. P. Brown etc. Co. v. L. & N. R. Co.,* 299 US 393) Holding that the court could proceed without prior resort to the Commission the Court said:

> "It is true that uniformity is the paramount purpose of the Commerce Act. But it is *not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission* to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of Federal law. If the parties properly preserve their rights, a construction given by any court, whether it be Federal or state, *may ultimately be viewed by this court, either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured.*"

This language was quoted and applied in *Pan American Pet. Corp. v. Superior Court,* 366 US 656, 665, where the court brushed aside the claim that state court decisions of federal questions might destroy uniformity saying that "the right to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions."

Secondly, where (as here) there is no action which could be taken by the Commission which would be of any aid to the court,

41. The Court expressed adherence to the *Merchants Elevator Case.*

there is no room for application of the primary jurisdiction doctrine. (Cf. *U. S. v. The Philadelphia Nat. Bk.,* above.) So if a matter has been passed upon by the Commission, no further Commission action is needed and there is no reason why the court should not proceed forthwith. *U. S. v. Western Pac. R. Co.,* 352 US 59, 69, said:

> "Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it."

The court cited *Crancer v. Lowden,* 315 US 631, which was just such a case.

Thirdly, the only administrative action on which a court should wait, is *lawful* action. This results logically and from the holding in *Penn. R. Co. v. U.S.,* 363 US 202, that if a stay of court proceedings waiting upon administrative action was proper, that stay should remain in effect until the administrative proceeding was *finally* determined by the conclusion of all review proceedings.

It follows from the foregoing, and, indeed, this is the holding of the cases, that where an administrative agency can take no action or can not give *all* the relief to which a party is entitled the courts are free to proceed (*Georgia v. Penn. R. Co.,* 324 US 439; *Hewitt-Robins, Inc. v. Eastern Freight-Ways Inc.,* 371 US 84[42]).

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42. In the *Panagra case, Pan American Airways v. U. S.,* 371 US 296, in note 19 the court said: "If it were clear that there was *a* remedy in this civil antitrust suit that was *not available* in a § 411 proceeding before the C. A. B., we would have the kind of problem presented in Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 US 84, where litigation is held by a court until the basic facts and findings are first determined by the administrative agency, *so that the judicial remedy not available in the other proceedings, can be granted.*" (Italics ours)

Cf. *Heisler v. Parsons,* 312 F2d 172, 176 (Cir 7); *U. S. v. Research Laboratories,* 126 F2d 42, 45, col 2 (Cir 9).

Finally, all of the earlier cases, *Cunard* and *Far East Conference* included, must be read as limited by *California v. Federal Power Commission*, 369 US 482, and its holding that antitrust issues are *not* administrative matters unless made so by the regulatory statute. There the court said:

> "Here, as in United States v. Radio Corp. of America, 358 US 334, while 'antitrust considerations' are relevant to the issue of 'public convenience and necessity' (id. 358 US at 351), there is no 'pervasive regulatory scheme' (ibid.) *including the antitrust laws* that has been entrusted to the Commission. And see National Broadcasting Co. v United States, 319 US 190, 223, 87 L ed 1344, 1366, 63 S Ct 997. Under the Interstate Commerce Act, mergers of carriers that are approved have an antitrust immunity, as § 5(11) of that Act specifically provides that the carriers involved 'shall be and they are hereby relieved from the operation of the antitrust laws. . . .' See McLean Trucking Co v United States, 321 US 67, 88 L ed 544, 64 S Ct 370.
>
> * * * *
>
> "It is not for us to say that the complementary legislative policies reflected in § 7 of the Clayton Act on the one hand and in § 7 of the National Gas Act on the other should be better accommodated. *Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency.* Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075. *The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to courts is in practical effect taken over by the Federal Power Commission.*"

This should be conclusive. Any concern the Federal Maritime Commission could have had with the antitrust statutes was committed to it only in a limited way (by approval of agreement submitted to it). *Now it can no longer act upon the matter here at*

issue both (a) because it can not give retroactive approval and (b) because, in view of the 1961 amendment of the Shipping Act, it could not even give prospective approval to the rate fixing combination and agreement here involved (46 USC § 814 now expressly forbidding approval of agreements such as the secret side agreement of January 1953).

Some consideration should be given to the *Panagra Case, Pan American World Airways, Inc. v. U.S.,* 371 US 296, for the contrasts which it provides. This was a civil suit by the United States for *injunctive* relief charging violations of the Sherman Act in what amounted to division of territory and routes in foreign air commerce with South America, presenting what the court characterized as "narrow questions" which, by the Civil Aeronautics Act, so the Court held, had been entrusted to the Board.

> "The acts charged in this civil suit as anti-trust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending or rejecting them, and in allowing or disallowing affiliations between common carriers and air carriers.[43] The case is therefore quite unlike Georgia v. Penn R. Co., 324 US 439 * * *"

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43. In *U. S. v. Philadelphia Nat. Bk.,* 374 US 321, the court indicated that what was said in the language just quoted was basic to the decision of the case and stated that *Panagra* held that because the Board "had been given broad" powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied "to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers." Indeed, in *Panagra* itself, footnote 19, the court said:

> "If it were clear that *there was a remedy in this civil antitrust suit that was not available in a § 411 proceeding before the C.A.B., we would have the kind of problem presented in Hewitt-Robins, Inc. v. Eastern Freight-Ways Inc.,* 371 US 84, 9 L ed 2nd 142, where litigation is held by a court until the basic facts and findings are determined by the administrative agency, *so that the judicial remedy not available in the other proceeding, can be granted.*"

Under the Civil Aeronautics Act the "industry has been regulated to a regime designed to change the prior competitive system"; "limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme"; "Congress has committed the regulation of this industry to an administrative agency of special competence that deals only with the problems of the industry" and it, "in regulating air carriage is to deal with at least some antitrust problems."[44] It was said that the "regime" of the statute "has its special standard of the 'public interest' as defined by Congress" and "it would be strange indeed if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations". The Court reinforced its conclusion by pointing out that not only had "the narrow questions presented by this complaint been entrusted to the Board" but that they presented problems that were beyond the field of judicial action and strange to judicial competency:

> "many of the problems presented by this case, which involves air routes to and in foreign countries, may involve military and foreign policy considerations that the Act, as construed by a majority of the Court in Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp., 333 US 103, 92 L ed 568, 68 S Ct 431, *subject to presidential, rather than judicial review.* It seems to us, therefore, that the Act *leaves to the Board under § 411 all questions of injunctive relief* against the division of territories or the allocation of routes or against combinations between common carriers and air carriers."

There was such an overlapping with the antitrust statutes that *injunctive* action by the courts could very well result in a head-on

44. "Pooling and other like arrangements are under the Board's jurisdiction by reason of § 412. Any persons affected by an order under §§ 408, 409 and 412 is 'relieved from the operation of the "antitrust laws",' including the Sherman Act § 414. The Clayton Act, insofar as it is applicable to air carriers, is enforceable by the Board."

conflict with the scheme of the Civil Aeronautics Act and the functioning of the Board to the point where action by the courts "would in effect deprive the subsequent statute of its efficacy" and "render its provisions nugatory" (see p. 21 above. But the Court was very careful expressly to point out that to the extent the subject was *not* governed by the Civil Aeronautics Act and remedies under that Act were *not* so broad as to give *all of the relief that could be obtained under the antitrust statutes,* the antitrust statutes were *not* superseded.

The Court said:

> "No mention is made of the Department of Justice and its role in the enforcement of the antitrust laws, yet we hesitate here, as in comparable situations, to hold that the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws—*absent an unequivocally declared congressional purpose so to do.* While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, *those expressly entrusted to it encompass only a fraction of the total.* Apart from orders which give immunity from the antitrust laws by reason of § 414, the whole criminal law enforcement problem remains unaffected by the Act. Cf. United States v. Pacific & A.R. & N. Co. 228 US 87, 105 L ed 742, 748, 33 S Ct 443. *Moreover, on the civil side violations of antitrust laws other than those enumerated in the Act might be imagined.* We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce."

It remains to consider *Cunard* and *Far East Conference* (a) in the light of the rule that they are not to be read more widely than their facts require, both under the general rule of interpretation of judicial decisions and under the special rule in this field that the Court is not making broad general holdings but is making its decisions "based on the particular facts of each case" (*U. S. v. Western Pac. R. Co.,* p. 25 above) and (b) to consider them "as

explained in *Federal Maritime Board v. Isbrandtsen Co.,* 356 US 481, 497-499" (to borrow the language from *U.S. v. R.C.A.,* quoted at p. 27 above).

U. S. Nav. Co. v. Cunard S.S. Co., 284 US 474, was an action for *injunctive relief* against claimed violations of the Sherman Act,—conference scheme of dual rate contracts. It was held that the district court properly dismissed the action. The court said that only a few cases need be noted and started with extended quotation from *Great Northern R. Co. v. Merchants Elevator Co.,* p. 27 above. It then noticed the coverage of the Shipping Act, and that carriage by water "involves questions of exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge" and may depend on facts peculiar to the business or its history "unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced"; that the charges made "either constitute direct and basic charges of violations" of the Shipping Act or are "so interrelated with such charges as to be in effect a component part of them". Accordingly it was held, and the exact language of the Court should be carefully noticed, that:

> "the remedy is that afforded by the Shipping Act, which to *that extent* supersedes the anti-trust laws."

[This remedy might be *complete* where only relief as to the *future* is sought because under § 22 a cease-and-desist order could be issued.] Since no relief was sought for *past* acts, but *only in respect to prospective conduct,* failure to file the agreement "will not afford ground for an *injunction*" for the Board was "fully authorized by § 22, supra, to afford relief upon complaint or upon its own motion".

There is no language here of repeal, expressly or by implication, nor is there any statement of complete exclusion of the antitrust laws. It is only "to that extent" that the antitrust laws are superseded.

It was argued that the agreement referred to in the complaint was one which could not be approved. To this the Court answered "But this is by no means clear" and went on to spell out reasons for believing that there was room for action by the administrative agency. [Here, at least, the decision seems modified by the later decision in *Isbrandtsen,* 356 US 481.]

Nothing in *Cunard* stands as an impediment to court action where, as here, the only possible questions are of law, the only relief sought is damages for injury by past conduct, and there is no action which the Commission could take which would give it legality. *Cunard* is explained fully by "the particular facts" of that case. The case, whether right or wrong in view of *Isbrandtsen,* 356 US 481, goes on the ground that an *injunction* would have interfered with the performance by the Board of its functions *in respect of the very matters complained of,* and, in this at least, history has shown that the court was correct.[45]

Far East Conference v. U. S., 342 US 570, was an action by the United States *to enjoin* violation of the Sherman Law. Again the object of attack was a dual rate system. As in *Cunard* the *only* relief asked was *prospective* in operation and might interfere with Board action. Resting on primary jurisdiction and *Cunard,* the Court held that the issue should first be submitted to the Board. Its explanation of the holding in *Cunard* is interesting and makes it clear that *Cunard* was *not* a case of repeal or sole remedy, but only of prior application to avoid court and Board conflict. *Far East* said of *Cunard*:

> "The Court thus applied a principle, now firmly established, that in cases raising issues of fact *not within the conventional experience of judges* or cases requiring the exercise of administrative *discretion,* agencies created by Congress for regulating the subject matter should not be passed over. This is

45. Legislation was necessary to permit approval of a dual rate structure in view of the decision in *Isbrandtsen,* 356 US 481.

> so even though the facts after they have been appraised by specialized competence *serve as a premise for legal consequences to be judicially defined.*"

By quotation from *U. S. v. Morgan,* 307 US 183, 191, it is again made clear that the doctrine is not a one of *sole* remedy but merely of prior agency action. There is nothing to indicate that the doctrine there applied would operate where the question presented to a court is solely one of law, or where there is nothing which the administrative agency can do to affect the result, where the court is concerned only with past conduct and where no relief sought will embarrass future Commission action. *Far East* was simply applying a doctrine which would *suspend* court action to allow the administrative agency to act *if* there were an "administrative question" presented upon which the agency could act and should act, the court then to act if there was *further* relief *to which the plaintiff was entitled.* If there could be any doubt about this that doubt is resolved by the reasons given for holding that in the circumstances of *that particular case* as it *then* presented itself, the action should be dismissed rather than stayed pending Commission action. The court expressly recognized that the problem was *not one of sole or exclusive remedy* but merely one of adjustment by waiting to see what would happen. It said:

> "Having concluded that initial submission to the Federal Maritime Board is required, we may *either* order the case retained on the District Court docket pending the Board's action (citing the two *El Dorado* cases) *or* order dismissal of the proceedings brought in the District Court."

If the *sole* remedy were under the Shipping Act and by the Commission the court had *no* choice to retain the case but was required to dismiss. It ordered it dismissed only because in the situation then presented action by the agency might dispose of the matter.

However, it expressly recognized that if further relief were necessary *it could be had in a new action.* The Court reasoned:

> "If the Board's order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application. (Citation) We believe that no purpose would here be served to hold the present action in abeyance in the District Court while the proceedings before the Board and subsequent judicial view or enforcement of its order are being pursued. *A similar suit is easily instituted later, if appropriate.*"

There is nothing in the majority opinion which remotely suggests that if there were no effective action which the Commission could take the court action should be dismissed or delayed. And, this is just what Mr. Justice Frankfurter, the author of that opinion, said in his dissent in *Isbrandtsen,* 356 US 481.

In the light of later decisions it must be noticed that Mr. Justice Clark did not participate in *Far East* and that Mr. Justice Douglas, with whom Mr. Justice Black concurred, dissented. The point of the dissent was that the dual rate agreement could have been immunized from the operation of the Sherman Act if it had been submitted to the Board and approved.

> "But that exemption from the Sherman Act can be acquired only in the manner prescribed by § 15. Here no effort was made to obtain it. Hence the petitioners are at large, subject to all of the restraints of the Sherman Act.
>
> "Why should the Department of Justice be remitted to the Board for its remedy? The Board has no authority to enforce the Sherman Act. * * *.
>
> "Petitioners, therefore, operate outside the law not only because they have failed to submit their schedule of rates to the Board but also because the rates adopted would, if approved, be illegal."

To this last statement is added a footnote: "There is less room for expertise for the rates used by the steamship companies are unfiled rates or unlawful rates." The opinion concludes:

"The jurisdiction of the Department of Justice must commence at this point, unless we are *to amend the Act by granting an anti-trust exemption* to rate fixing not only when the rates are filed by the companies and approved by the Board *but also when they are not filed at all or are rates which, if filed, could not be approved. I would read the Act as written and require the steamship companies to obtain the anti-trust exemption in the precise way Congress has provided.*"[46]

The last decision in this chapter is that in *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481 which held that the dual rate system which underlay *Cunard* and *Far East Conference* was unlawful as matter of law and beyond the power of the Commission to approve (in the course of which the Court pointed out the narrowness of the doctrine on which those cases rested), and this led Mr. Justice Frankfurter, the author of the majority opinion in *Far East Conference,* to dissent wondering (in substance) if this were so then why in *Cunard* and *Far East Conference* time was wasted sending the case to the Commission.

The Court of Appeals can not find, and in fairness it must be stated does not attempt to find, any matter which if dealt with by the court would conflict with or embarrass future Commission action (the proposition basic to the holding of *Cunard, Far East Conference* and *Panagra* and the limits of which *Panagra* is so careful to point out (p. 34 above)). But it does endeavor to find "administrative questions" calling for the exercise of Commission special expertise. In effect it says the joint increase of rates may have been approved action (apparently on the ground No. 8200 could be construed to permit fixing rates by joint action), that though Second of No. 8200 reserves to PWC the right of independent action there may have been a waiver of this right in this case, that it is for the Commission to say what agreements were

46. Compare p. 23 above.

made, and that the Commission might find the agreement for joint fixing of rates might not need Commission approval.

In saying that Agreement No. 8200 provided for the joint fixing of rates by both conferences the Court of Appeals is, with deference, in error,[47] and even if there is language which might possibly lend support to such a construction it is subject to the explicit reservation of the right of independent action in provision Second which applies to increase in rates as well as to veto of proposed reductions. But whether we are right or wrong about this, the question is, as the Court in fact came to treat it, a legal question of construction of an agreement and one for the courts not the Commission (*Great Northern R. Co. v. Merchants Elevator Co.,* 259 US 285), to be decided by the trial court in the first instance and not by the Court of Appeals as a basis for sustaining the trial court's refusal to decide it. The question is not whether in the exercise of expert discretion an agreement should be approved but only what it means. It is a matter of construction that calls into play none of the considerations enumerated in *Cunard* as well understood (*sed quaere*) by a

47. Agreement No. 8200 is set out in full in Appednix D.

The language the Court first quotes from it (App. p. 29) is only an orienting recitation in the preamble stating the obvious that "it is essential that the parties shall, from time to time establish the rates". Nothing is said about rates being established (or changed) *only* by *joint* action of both conferences.

The language next quoted is quoted out of context from a sentence which is later incorrectly paraphrased. This sentence is in provision First and refers only to the matters "coming before the *initial* meeting for consideration and action" and even then refers *not* to matters to be determined but only to the *way* in which each conference shall act i.e. each is to act "in accordance with the procedure prescribed by its respective Conference Agreement with respect to the establishment or change of rates."

The opinion at App. p. 31 recognizes that this is the proper construction of the quoted language. This is made clear by paragraph 1 of the preamble which provides that "whenever reference is hereinafter made to action which is required or permitted to be taken by the Pacific Lines, such reference is intended to refer to *action* such as is required to effect the establishment or change of rates *pursuant to said Agreement No. 57,* as amended." Paragraph 2 is a like provision as to the Atlantic/Gulf Lines.

specially trained agency and generally unfamiliar to court. It is a matter of every day diet of courts.[48]

Even if there is room to conclude that No. 8200 provided for joint fixing of rates there is no room to question the clear reservation in Second of the right of independent action to change rates.

As to the refusal to reduce the increased rate, it appears without contradiction that PWC determined the request for reduction should be granted, requested concurrence and when this was refused,[49] although No. 8200 Second expressly reserved the right of independent action,[50] withdrew the request "agreeably to the" improper side agreement alleged in paragraph 18 of the complaint.[51]

The Court of Appeals said, however, that the "exercise of this right of independent action is discretionary"; that the Commission might hold this privilege could be waived in a particular case and that here PWC merely waived its right; that this was a single occurrence. Going outside the record it is noted in a footnote that on two occasions PWC acted independently and that this seems to negative an agreement never to act independently. The facts as alleged *and undenied* are to the contrary.

48. *Great Northern* is not to be put aside because there the question was one of construction of a railroad tariff and here it is one of construction of an agreement. Construction of agreements is certainly more day-to-day concern with courts than is the construction of tariffs.

49. After an exchange of 13 wires, if the factual showing is to be enlarged by the examiner's report.

50. "Second" may not have been required by the Shipping Act before 1961 but it is clear that No. 8200 was not approved without it. Frank and explicit removal of it surely would have been a major modification requiring Commission approval and clandestine removal by an agreement to change only with concurrence should fare no better. The importance of the provision is pointed up by the 1961 amendment of the Shipping Act expressing the reservation of the right of independent conference action as a matter of Congressional policy.

51. Compt. par. 25. Par. 26 further alleged that plaintiff's request "was declined by reason of the refusal of defendant FEC to concur" and that the PWC statement that the action was by members of PWC was false.

The question is not whether PWC could act independently but whether PWC did *in fact* act independently or acted in pursuance of the unapproved conspiracy.[52] The latter is alleged and so far is not denied. If an issue should be made then we have the *classic* antitrust question, for jury determination, under § 1 of the Sherman Act,—was defendant's conduct the result of its independent determination of a business problem or the result of an agreement? No special agency expertise is required for the resolution of this question. It is a typical jury question in antitrust cases. And if the court below was to indulge in the very dangerous practice of going outside the record before it, it should have noticed that only the Korean incident occurred before the proceeding before the Commission was instituted (the Kraft liner board matter came later) and that *it* was a single instance of independent action although there had been from 1953 through 1959, 1666 occasions of contemplated change with requests for concurrence (714 requests by FEC and 952 by PWC), no other changes had been made without concurrence, many were long delayed waiting concurrence, 161 were not made for want of concurrence and an additional 13 requests withdrawn. In such circumstances a single failure to honor the alleged secret side agreement does not negative its existence, or at least a jury could so find.

The question of what agreements, other than No. 8200, were in fact made is not an administrative question. To determine this requires no knowledge of the history of the shipping industry or the Shipping Act or the intricacies of either. It is the typical *jury* question in every Sherman Act § 1 conspiracy case.

Finally, if there is any possible question as to whether the unapproved side agreement was of the sort required to be approved the question is one of construction of the statute and of law for

52. Any civil conspiracy case is one where what the defendants did any one of them could have done alone and without conspiring.

the courts (*Maryland & Va. Milk P. Ass'n v. U. S.*, 362 US 458, 468). And as to past conduct there is no jurisdiction in the Commission to exercise its discretion to approve. With deference, the Court is in error in saying (App. p. 33) if a new agreement was made which required approval "exclusive primary jurisdiction is in the Board". To do what? Nothing it could do could breathe legality into what the statute (§ 15) declares to be illegal if done before approval.

CONCLUSION

It is respectfully submitted that the matter of accommodation of the provisions of the antitrust statutes providing for private actions to recover treble damages with industry regulating statutes such as the Shipping Act, calling for approval which was not asked or given, is a matter upon which this Court has not directly passed (although it spoke to this by way of setting apart civil actions in the decision in *Panagra*, p. 34 above) and is of sufficient importance to warrant review in this case to correct what is believed to be serious error.

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Carnation Company

Appendix A

OPINIONS BELOW

In the United States District Court for the Northern District of California, Southern Division

No. 41153

Carnation Company, a corporation,
Plaintiff,
vs.
Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, et al.,
Defendants.

MEMORANDUM OF OPINION

After careful consideration of the record and the briefs the Court has come to the following conclusions:

The Shipping Act, 46 USC Sec. 821, provides a remedy for any violation of the Act.

To carry out a rate agreement between carriers before approval of the Commission is an unlawful violation of the Act (46 USC Sec. 814).

This issue is tendered by plaintiff's complaint.

The Supreme Court has held that the antitrust laws are superceded to the extent that the Shipping Act provides a remedy. *United States Navigation Co. v. Cunard,* 284 U.S. 474 (1931); *Far East Conference v. United States,* 342 U.S. 570 (1951); See also *American Union Transport v. River Plate,* 126 F. Supp. 91 (S.D. N.Y. 1954), aff'd 222 F.2d 369 (2d Cir. 1955); *Rivoli v. New York,* 167 F. Supp. 940, 943 (S.D. N.Y. 1956); *United States v. Alaska SS Co.,* 110 F. Supp. 104 (W.D. Wash. 1952).

Although plaintiff contends that these cases are narrower in their holding and effect than they seem to indicate, this Court is of the opinion that these decisions of the Supreme Court and

decisions of other courts following them, are well-establis
precedents for applying the doctrine of exclusive primary j
diction to the Shipping Act in the present case.

The motions to dismiss, therefore, are granted and mo
parties will prepare, serve and present an order accordingly

Dated: June 20th, 1963.

/s/ W. T. Sweigert
United States District Ju

Filed June 21, 1963
James P. Welsh, Clerk

United States Court of Appeals for the Ninth Circuit

No. 18,926

Carnation Company, a corporation,
Appellant,
vs.
Pacific Westbound Conference, Far East Conference and the Federal Maritime Commission, et al.,
Appellees.

[July 30, 1964]

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Before: CHAMBERS, POPE and JERTBERG, Circuit Judges.

POPE, Circuit Judge.

On December 5, 1962, the appellant Carnation Company filed in the court below its complaint against Pacific Westbound Conference and Far East Conference, and numerous individual shipping lines, members of those conferences, seeking recovery of treble damages under the antitrust acts[1] on account of damages claimed to have been suffered by Carnation through an alleged unlawful combination fixing prices and rates for shipment of Carnation's manufactured products to the Philippine Islands, pursuant to agreements among them which had not been filed with

1. Jurisdiction was invoked under Sections 1 and 2 of the Sherman Act (26 Stat. 209, 15 U.S.C. Secs. 1 and 2), Section 4 of the Clayton Act (38 Stat. 731, 15 U.S.C. Sec. 15) and Secs. 1331 and 1337 of Title 28, U.S.C.

or approved by the Federal Maritime Commission.[2] This appeal is from an order dismissing the action on the ground that the matters complained of were within the primary jurisdiction of the Commission.

Each of the defendant conferences had on file with the Maritime Commission an approved agreement of the kind referred to in Sec. 15 of the Shipping Act. Pacific Westbound Conference's approved agreement known as No. *57*, was designed, among other things, to carry out the purpose of that Conference to fix the rates at which conference members would serve shippers in foreign commerce westbound from Pacific Coast ports. The Far East Conference had a similar approved agreement designated as No. *17* on the records of the Commission. In addition, the members of the two conferences had another agreement providing for joint fixing of rates by both conferences, known as No. *8200*, which was approved on December 29, 1952. The burden of the complaint of Carnation is that a certain increased rate fixed and put into effect, relating to plaintiff's product and its rates for shipping over the routes traversed by the members of the Pacific Westbound Conference, was established between the members of both conferences, not pursuant to Agreement No. *57*, nor pursuant to Agreement No. *8200*, the approved agreements, but pursuant to another agreement which was not presented to or approved by the Commission. Accordingly, it is said the fixing of that rate was a per se violation of the Sherman Act. This forms the basis for Carnation's claim for treble damages.

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2. Sec. 15 of the Shipping Act, 1916, (46 U.S.C. Sec. 814) as it read on the dates involved in this action, provided that common carriers by water shall file with the Commission a copy of every agreement with another carrier fixing or regulating transportation rates or fares controlling or regulating competition, or providing for an exclusive preferential or cooperating working arrangement; the Commission was authorized to disapprove any such agreement which it found to be unjustly discriminatory or unfair or otherwise in violation of the Act but it was required to approve all other agreements; and it provided that "every agreement . . . lawful under this section shall be excepted from the provisions of Sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

Prior to the institution of the present action, on October 26, 1959, the Federal Maritime Board, predecessor agency to the Federal Maritime Commission,[3] ordered an investigatory proceeding entitled "No. 872, Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference" instituted pursuant to Sections 15, 16, 17 and 22[4] of the Shipping Act. The order directed that the Board "enter upon an investigation and hearing to determine whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of said Sec. 15, and whether it is being carried out in a manner which makes it unjustly discriminatory or unfair," etc.

The Carnation Company on September 3, 1960, petitioned the Board for leave to intervene in that proceeding, and on September 8, following, leave so to intervene was granted.[5]

Hearing was had in this matter before an examiner and extensive sessions were held in San Francisco, New Orleans and Wash-

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3. When the Shipping Act of 1916 was passed it vested its administration in the United States Shipping Board. By a succession of Executive Orders this board was succeeded first by the United States Maritime Commission, then by the Federal Maritime Board, and finally by the present Federal Maritime Commission.

4. 46 U.S.C.A. Sec. 821: "Complaints to Board and investigations. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter."

5. Other parties, including some Pacific Coast ports, also intervened, on grounds not material here.

ington. The examiner filed an initial decision on August 30, 1963, which is reported in 2 Pike & Fischer, Ship. Reg. Rep. 900. The issues presented at this hearing by Carnation and others included in general the same matters and claims set forth in Carnation's complaint in this case.

That complaint alleges that in January, 1953, defendants met at Santa Barbara, California, and then and there secretly conspired and agreed to fix rates for transportation of commodities by members of the Pacific Westbound Conference from Pacific Coast ports of the United States to the Far East "not as provided in said Agreement No. 57 and not as provided in said Agreement No. 8200", and thereafter met and secretly renewed said association and agreement and agreed as follows: (a) Neither Conference nor any member thereof "should disclose to any shipper information regarding rate changes and/or the position of either Conference or of any member of either Conference regarding rate requests;" (b) Both Conferences would fix and agree upon the rates for transportation of commodities by water by members of Pacific Westbound Conference in trade from Pacific Coast ports to the Far East including the Philippine Islands; and that the rate so fixed should be given out by Pacific West Coast "falsely pretending to act as such and under said Agreement No. 57;" (c) Pacific Westbound Conference, contrary to the provisions of Agreement 57 and Agreement 8200 would make no change in any rate established by it or fixed as aforesaid, without the concurrence of the Far East Conference with the exception of the commodities placed on a "list of initiative items", which did not include condensed or evaporated milk; that rates for evaporated milk were agreed upon and issued. The complaint further states that the Conferences and their members, acting pursuant to the agreement alleged, agreed to increase rates on evaporated milk from the United States to the Philippine Islands by $2.50 per ton, purportedly pursuant to the provisions of Agreement No. 57, and these rates were put into effect over the plaintiff's pro-

test; that this was done pursuant to the above described secret agreement which was never submitted to the Commission and that carrying it out was an unlawful combination and conspiracy in restraint of trade.

It was alleged further that in November, 1957, plaintiffs requested Pacific Westbound Conference to reduce such rate by $2.50 per ton to the rate previously established; that the Pacific Westbound Conference was willing to grant that request subject to the concurrence of the Far East Conference; that the defendant Far East Conference declined to grant such concurrence; that in advising plaintiff of its denial of the request for reduction Pacific Westbound Conference represented that the members of that Conference, after long and careful study, though initially disposed to grant a reduction, denied the same; that this statement was false in that the request for reduction was in fact declined by reason of Far East Conference's refusal to concur in the reduction; and that plaintiff did not learn of these matters until disclosure thereof was made in May, 1961, in the course of the proceedings before the Commission which is described above.

It thus appears that prior to and at the time of the institution of this action the Commission had under investigation substantially the same question as that sought to be raised by the complaint filed under the antitrust laws. The Federal Maritime Commission was granted leave to intervene in this action in the court below. Intervener and all defendants moved to dismiss the action on the ground that the Shipping Act provided the exclusive remedy for the wrongs alleged in the complaint, and that the court was without jurisdiction to proceed.[6] The motion to dismiss was granted.

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6. The motion asserted that the acts alleged in the complaint constituted charges of violations of provisions of the Shipping Act which, to the extent of such acts and charges, supersedes the antitrust laws, and that the remedy for such charges was that afforded by the Shipping Act; that the Court is without jurisdiction of the subject matter; that the practices adopted by the carrier in connection with the rates established by them are

In dismissing the action, the court below relied upon the decisions in the cases of U. S. Nav. Co. v. Cunard Steamship Co., 284 U.S. 474, and Far East Conf. v. United States, 342 U.S. 570. It seems plain to us that both of these decisions support and require the action of the court below.

In Cunard the action was brought by the Navigation Company to enjoin the respondent steamship companies from continuing an alleged combination and conspiracy in violation of the Sherman Act and the Clayton Act. The trial court there granted a motion to dismiss on the ground that the matters complained of were within the exclusive jurisdiction of the United States Shipping Board under the Shipping Act of 1916. The bill there alleged that the defendant corporations were engaged in carrying 95 percent of the cargo trade from Atlantic ports of the United States to the ports of Great Britain and Ireland and those defendants and the plaintiff were the only lines maintaining general cargo services in that trade. It was charged that the defendants had entered into a combination and conspiracy to restrain the foreign trade and commerce of the United States in respect to carriage of cargo over the routes mentioned and with the object and purpose of driving the petitioner and all others not parties to the combination out of such trade and commerce. The conspiracy was said to involve the establishment of a general tariff rate and a lower contract rate, the lower rate to be made available only to shippers who agreed to confine their shipments to the lines of the defendants. These were alleged to be coercive measures not predicated upon differences in volume or frequency of service but rather to be wholly arbitrary.

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within the exclusive jurisdiction of the Federal Maritime Commission, which is authorized to afford complete remedy with respect thereto. Attention was called to the proceeding then pending before the Maritime Commission in which substantially the same issues as those tendered by the complaint would be decided by the Commission. In support of its motion to dismiss, the Maritime Commission filed an affidavit by its Secretary setting forth portions of the record in its docket No. 872 previously mentioned.

It was conceded that looking to the Sherman Anti-Trust Act alone the bill stated a cause of action under Secs. 1 and 2 of the Sherman Act which would warrant an injunction under Sec. 16 of the Clayton Act unless the Shipping Act stood in the way. When the case reached the Supreme Court, that Court's opinion proceeded to state the provisions of the Shipping Act which it described as "a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." (P. 480) After reviewing other decisions of the Court, and particularly the case of Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, the Court affirmed the dismissal of the action upon the ground that the matter was "within the exclusive preliminary jurisdiction of the Shipping Board."[7]

The Court reached this conclusion despite the allegation in the bill that the agreement in question had not been filed with the Board pursuant to Sec. 15 of the Shipping Act. The Court stated (p. 486): "But a failure to file such an agreement with the board

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7. The Court said: "The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. . . .

"A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violation of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws. Compare Keogh v. Chicago & N. W. Ry. Co., supra, at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board." 284 U.S. at 485.

will not afford ground for an injunction under Sec. 16 of the Clayton Act at the suit of private parties . . . since the maintenance of such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist."[8]

The Cunard case was followed by Far East Conf. v. United States, supra, decided in 1952. That also was a suit to enjoin alleged violations of the Sherman Antitrust Act but it differed from the action in the Cunard case in that this suit was brought by the United States. The violation of the Act complained of was that the defendants, the Far East Conference, and its members, had entered into an agreement establishing a dual rate system. The defendants moved that the complaint be dismissed on the ground that issues involved should properly first be adjudicated before the Federal Maritime Board rather than a district court. The Court said: "We see no reason to depart from [Cunard]. That case answers our problem."[9] The Court characterized the rationale of Cunard as follows: (342 U.S. at 574) "The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence

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8. The reasoning by which the Court arrived at this conclusion as stated in this quotation, includes a discussion of Sec. 15 of the Shipping Act. After referring to the agreements mentioned in that section the Court said: "Thereupon the board is authorized to disapprove, cancel or modify any such agreement, *'whether or not previously approved by it,'* which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., 'or to operate to the detriment of the commerce of the United States, or to be in violation of this Act.' . . . If there be a failure to file an agreement as required by Sec. 15, the board, as in the case of other violations of the act, is fully authorized by Sec. 22 supra to afford relief upon complaint or upon its own motion." (Emphasis added.)

9. The fact that the suit was brought by the United States instead of by a private party was held no basis for distinction from the Cunard case.

serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

As noted in the dissenting opinion in Far East, although the conference agreement was approved by the United States Shipping Board, that agreement did not contain any provision for dual rates. It was the dual rate aspect of the defendants' arrangement which was the basis for the Government's antitrust suit. The dissent argued that if the Board had expressly approved the dual rate system there would be immunity from the Sherman Act, but since the agreement as put in operation had not been fully approved, the Court should not hold that the exclusive primary jurisdiction was in the Board. The Court majority did not accept that contention. In Far East, as in Cunard, exclusive primary jurisdiction was in the Board or Commission notwithstanding the questioned provisions of the agreement had not been approved by the Board.

Appellants here argue that neither Cunard nor Far East control this case, since it involves proceedings not to procure an injunction but to recover damages on behalf of a private corporation. There are two reasons why we reject that suggested distinction. In the first place, the considerations which make up the rationale of Cunard and Far East are fully as applicable in a treble damage suit as in one seeking injunction. Preliminary resort to the Commission is as necessary here in order to secure the uniformity of application of the Congressional scheme, and in order to procure resolution of the facts by a body having an adequate appreciation of the intricate business of transportation by sea. As stated in Far East (342 U.S. at 574) the Cunard case "applied

a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." Later in this opinion we shall note more fully why this is that sort of case; and it has such character no less because this suit is one for treble damages.

The second reason is the existence of authority to the contrary. The Second Circuit rejected an almost identical contention in American Union Transport v. River Plate & Brazil Conferences, 2 Cir., 222 F.2d 369, where it affirmed a dismissal of a treble damage antitrust suit on the district court's opinion, 126 F. Supp. 91.[10]

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10. Plaintiff in that case sued conference members for treble damages, alleging a conspiracy to restrain foreign trade by denying payment to plaintiff of freight brokerage. The Board had jurisdiction under the Shipping Act to include the regulation of freight forwarders and brokers, and had done so. Defendants had put into effect their procedures pursuant to an unfiled and unapproved agreement. The opinion, so adopted, followed and applied Cunard and Far East, saying: "The failure to file an agreement, . . . whatever other effect such failure may have, does not leave the offending parties 'at large', subject to the antitrust laws. If there is any inconsistency apparent between this conclusion and the language of Sec. 15 of the Shipping Act, as pointed out by Mr. Justice Douglas, the clear language of the Supreme Court authoritatively compels the decision. . . . Although the court is not asked for injunctive relief, it is not at all clear that judicial intervention in this field even to the extent of trying a case for damages would not interfere with the uniformity of treatment and the regulatory policy of the board based on specialized considerations within its exclusive competence. . . . It appears indeed, that the plaintiff has filed a complaint with the board against the present defendants asking for reparations under Sec. 22 of the act and for a cease and desist order. It is unreasonable to suggest that the plaintiff may not seek relief from the board under that section, which permits 'any person' to file a complaint. Consequently, a case is presented within the exclusive primary jurisdiction of the Federal Maritime Board." 126 F. Supp. 93.

Since the argument in this case the Second Circuit has decided Trans World Airlines v. Hughes, ... F. 2d ......, (June 2, 1964). The question presented was whether certain conduct of the defendant charged to amount to an attempt to monopolize the business of selling aircraft and aircraft supplies, was immunized from antitrust recovery because of primary jurisdiction in the Civil Aeronautics Board. Holding that such primary juris-

Appellants have attempted to demonstrate that the rule applied in Cunard and Far East would no longer be acceptable to the Supreme Court; that those cases have, because of later decisions, been interpreted to mean something different than what they seem to hold. This contention is one which we cannot accept. As late as 1963, in United States v. Philadelphia Nat. Bank, 374 U.S. 321, 353, the Court cited with apparent approval the Far East Conference case as holding that judicial abstention is required "where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." And as an inferior federal court we are not about to make rulings based on any assumption that the Supreme Court is likely to repudiate its former decisions.[11]

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diction did not exist the court noted that the acts charged in the Trans World Airlines case were not, as in Pan American World Airways v. U. S., 371 U.S. 296, "precise ingredients of the Board's authority," that the transactions charged were "unrelated to any specific function of the C A B," that the Board was given "no explicit jurisdiction" over such transactions, and that in any event the Board was without power to award money damages. Because of these circumstances the case clearly differed from that court's River Plate decision, which it did not even cite; and, for the same reason, it differs from the present case where the authority of the Maritime Commission is as broad as that stated in Cunard as follows: (284 U.S. at 487) "And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter . . . Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

11. In Penfield Co. of Cal. v. Securities and Exch. Com'n, 9 Cir., 143 F. 2d 746, 749, this court said: "We cannot agree that an inferior federal court may make its prognostication of the weather in the Supreme Court chambers, however well fortified in judicial reasoning, and forecast that the Supreme Court 'seems' about to overrule its prior decisions, and outrun that Court to the overruling goal. It is not a fanciful conjecture that, if such guessing contest were permitted, the ingenuity of judges, stirred by varied philosophies of governmental and social regulations, would find rational arguments for overruling a score of Supreme Court decisions. To the strain on the legal profession of many recent overrulings, some enumerated in the last paragraph of Smith v. Allwright, 321 U.S. 649, . . . should not be added that of the overruling prescience of ten circuit courts of appeals and upwards of ninety district courts."

We think that appellants' effort to assert the lack of continuing authority of Cunard and Far East is entirely fallacious and altogether unsupportable.[12]

Ordinarily we would be content to rest this case upon the authority of the cases we have here cited. But because of the vigor and earnestness with which appellant has argued that those cases are not controlling here, we now proceed to enumerate some of the reasons why we think the results reached in those cases were inevitable, and why the same conclusion as to exclusive primary jurisdiction in the Commission must be upheld here.

THE SHIPPING ACT'S PERVASIVE REGULATORY SCHEME

In the first place, when we consider the powers and authority of the Commission, we must note that under the Shipping Act,

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12. There is little point in attempting to spell out the manner in which this portion of appellant's argument proceeds. In general outline it is as follows: In his dissent in the Far East Conference case, Justice Douglas took the position that exclusive primary jurisdiction in the Commission did not apply to unfiled agreements, and that the dual rate agreement there involved was unapprovable under Sec. 14 of the Shipping Act.

In Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, at 500, Mr. Justice Frankfurter, who had written the opinion in Far East Conference, dissented from the majority opinion which held that particular approved agreement providing for a dual rate system to be in violation of Sec. 14 of the Shipping Act, saying (at 522): "In both cases [Cunard and Far East Conference] the Court's attention was directed to the claim of *per se* illegality. In both cases the plaintiffs urged that, since the dual-rate contract system violated Sec. 14, the Board was without power to approve it. . . . And in *Far East Conference,* the claim that now prevails was a main ground of dissent." Appellant contends that what Mr. Justice Frankfurter thus said in this Isbrandtsen case demonstrates that the majority in Isbrandtsen were reversing and rejecting Cunard and Far East Conference. It must be manifest that appellant's attempt to draw that conclusion from a dissenting opinion must be a fruitless one. This was noted by Mr. Justice Harlan in a separate dissent in that case who disagreed with what Mr. Justice Frankfurter's dissent said about Cunard and Far East Conference. The Isbrandtsen case had nothing to do with the present problem of exclusive primary jurisdiction in the Commission. That case reached the court of appeals and then went on to the Supreme Court on a petition to review a decision of the Federal Maritime Board. It had nothing to do with an attempted suit under the antitrust laws; it dealt solely with the question of the legality of a dual rate system. No issue relating to a dual rate system is before us in the present case.

as it was at the time of the matters alleged in the complaint, (and also as it is today), the Commission had, in contrast with the banking agencies in United States v. Philadelphia Nat. Bank, supra, (374 U.S. at 351) "regulatory and remedial powers." In contrast with the powers of the Federal Power Commission in California v. Fed. Power Comm'n., 369 U.S. 482, 485, those granted to the Maritime Commission composed a "pervasive regulatory scheme." The following summary of the provisions of the Shipping Act discloses the extremely broad range of regulatory powers, particularly as concerns shipping in foreign trade, vested in the Commission.[13] "The Act prohibits: (1) deferred rebates, (2) 'fighting ships,' (3) retaliation or discrimination against any shipper, and (4) unfair or unjustly discriminatory contracts with any shipper. A fine of not more than $25,000 for each offense is provided as the penalty for a breach of these provisions. If water carriers—other than citizens of the United States —violate the foregoing provisions or deny an American common carrier admission to a conference on equal terms with all other parties, the Secretary of Commerce, upon certification by the Board, is empowered to bar vessels of the offending parties from United States ports.

"All agreements, understandings, conferences, or other arrangements between parties subject to the act which affect competition in any way, or changes in earlier agreements, must, according to Section 15 of the 1916 act, be filed with the Board. The Board, furthermore, may disapprove, cancel, or modify any such agreement or modification thereof deemed to operate to the detriment of United States commerce, to be in violation of the act or to be

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13. Since the complaint here refers to acts and things alleged to have been done by the defendants between "before January, 1953" (including November, 1952) to and including May, 1961, we have chosen to describe the powers of the Commission under the Shipping Act as that Act existed prior to the amendments of October 3, 1961, Pub. L. 87-346, 75 Stat. 762. A consideration of the 1961 amendments would lead to no different conclusion than that we reach here.

'unjustly discriminatory or unfair' between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Approved agreements are exempted from the anti-trust laws. Violators are subject to a fine of $1,000 for each day of the offense.

"It is unlawful: (1) to give unreasonable preference to any person, locality, or description of traffic, or to subject any of the foregoing to undue disadvantage; (2) to permit by false billing, weighing, etc., transportation at less than regular rates; (3) to influence insurance companies to discriminate against a competitor; and (4) to disclose information detrimental to shippers or consignees. It is also unlawful for any shipper, consignor, or consignee to obtain or attempt to obtain by false billing, false weighing, etc., rates less than otherwise applicable. A fine of not more than $5,000 is provided for each offense.

"The charging of rates or fares that are 'unjustly discriminatory' between shippers or ports, or 'unjustly prejudicial' to United States exporters compared to their foreign competitors, is prohibited, and the Commission is empowered to alter rates which are in violation of this section. Reasonable regulations covering practices relating to receiving, handling, storing, or delivery of property must be observed, and the Board has authority to require the filing of reports, records, etc., of any person subject to the Act. The Board is also authorized to investigate any violation of the act on its own volition, or upon the filing of a complaint. In the latter case full reparation for injury may be awarded if the complaint is filed within two years of the cause of action."[14]

A key provision of the Act, significant here, is Sec. 15 (46 U.S.C. Sec. 814) which provides that common carriers and conferences thereof, such as the defendants in this case, shall file their agreements for regulating transportation or rates, or con-

14. This quoted summary is from Marx, International Shipping Cartels: A Study of Industrial Regulation by Shipping Conferences, pp. 106-107.

trolling competition, or providing for cooperative working arrangements, with the Commission. The section, as it read at the time here in question, is set forth in the margin.[15] In brief, it authorizes the Board to "disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it" that it finds to be unjustly discriminatory or unfair and the Commissioner is required to approve all other agreements. It makes such agreements lawful only when

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15. "Sec. 814. Contracts between carriers filed with Board. Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

and as soon as approved by the Board, and makes it unlawful to carry out an unapproved agreement. It provides that agreements lawful under the section shall be excepted from the provisions of the antitrust laws and provides a penalty of $1,000 for each day of violation continuance.

Another key section is section 22 (46 U.S.C. Sec. 821) which is set forth in full in footnote 4, supra. It is this section which provides for the filing of complaints with the Commission alleging violation of the Act and asking reparation for the injury caused thereby. The Commission shall investigate complaints and shall make such orders as it deems proper; it is authorized to award full reparations to the complainant. The Board may on its own motion investigate any violation of the Act and make similar orders with respect thereto.

The Act provides for full hearing in relation to any complaint or proceeding pertaining to violations of the Act, for the keeping of records of the Board, and for publication of its reports; it authorizes enforcement of the orders of the Board by district court order, and provides for a review or setting aside of orders by the appropriate court.[16] In the exercise of its "regulatory and remedial powers" to enforce the Act's "pervasive regulatory scheme", it is for the Commission to pass upon the following questions: whether the defendants did or did not make certain agreements, whether those agreements, if made were such as to require Commission approval, whether such agreements, if not filed, should nevertheless, now, in the language of the Cunard case, "upon a full consideration of all the attending circumstances, be approved or allowed to stand with modification." These are, as we shall more fully note hereafter, "precise ingredients of the [Commission's] authority." Pan American World Airways v. U. S., 371 U. S. 296, 305.

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16. Since 1950 review of the Commission's orders is by courts of appeals under Chapter 19A of 5 U.S.C. Secs. 1031 to 1042.

TO ESTABLISH A CONTROLLED SYSTEM OF AGREEMENTS DESIGNED TO LIMIT COMPETITION

Another reason why we think it must have been the congressional intention, as held in the cases previously cited, that exclusive primary jurisdiction should rest with the Maritime Commission, is that the congressional objectives in the passage of the Shipping Act were entirely different from the objectives designed to be obtained through the antitrust acts. In the case of the latter, the congressional purpose was, as has been so often noted, to preserve, protect and enforce full and free competition. But the legislative history of the Shipping Act discloses that Congress had in mind in that enactment a very different objective due to the special problems of shipping lines in foreign trade which called for a special and different mode of regulation than that provided by the antitrust laws.

The Alexander Report[17] which led to the enactment of the Shipping Act, discloses that the object of the Act was to permit a controlled system of agreements designed to *limit* competition.[18]

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17. House Com. on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliation in the American Foreign and Domestic Trade, 4 H.R. Doc. No. 805, 63d Cong. 2d Sess. (1914) pp. 415 to 421.

18. The Committee noted that it had been the almost universal practice for steamship lines engaged in the American foreign trade to operate under the terms of agreements or understandings which had for their purpose the regulation of competition through fixing or regulating of rates, apportionment of traffic, the pooling of earnings, or meeting the competition of non-conference lines. The Committee considered two alternatives: either the prohibition of such agreements with a view to "attempting the restoration of unrestricted competition" or recognizing such agreements and permitting them under circumstances which would eliminate abuses. The Committee noted the advantages and disadvantages of these alternative proposals, and concluded that the advantages which were substantial, "can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under government supervision and control." The Committee observed that "to terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the

In these respects it was similar to certain portions of the Federal Aviation Act, concerning which the Court said in Pan American World Airways v. U. S., supra, at p. 301: "Since 1938, the industry has been regulated under a regime designed to change the prior competitive system." The objective of limiting competition led to the provision in Sec. 15 that agreements lawful under that section "shall be excepted from the provisions of Secs. 1-11 and 15 of Title 15."

In Cunard the Court noted that the proper place to determine whether this special regime designed to change the prior competitive system should be effective was before the board.[19]

UNDER DIRECTION OF A COMMISSION SPECIALIZING IN OCEAN TRANSPORTATION

Another reason for our conclusion is that Congress, in setting up this elaborate system of controlled cooperation in respect to rates, shipping conditions, and other matters relating to carriers in foreign trade, and committing its regulation and enforcement to a special commission, contemplated that this commission would

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strong, or, to avoid a costly struggle, they would consolidate through common ownership."

The Committee's recommendation was that the administration of the Act should be left to the Interstate Commerce Commission. That portion of the recommendation was not adopted; instead the Congress established the United States Shipping Board whose functions were later vested in the United States Maritime Commission, which in turn was succeeded by United States Shipping Board, which was in turn succeeded by the Federal Maritime Commission, the present intervener. See Historical Note at 46 U.S.C. 804.

19. Said the Court (284 U.S. at 487): "And whatever may be the form of the agreement and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.

become familiar with the problems of foreign water-borne commerce and develop considerable expertise in connection therewith.

The Act lists many standards whose application requires more than ordinary familarity with ocean transportation.[20] Thus it seems appropriate to say that the Commission is the body most qualified to decide what agreements will, or will not, "operate to the detriment of the commerce of the United States."[21] As was said in Cunard, supra, (p. 487) "Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

The Commission, so far as we are advised, has not yet acted upon the examiner's initial report; but that report discloses that the examiner has recommended the very thing suggested in the

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20. Some of the phrases used are "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports . . . or to operate to the detriment of the commerce of the United States" (Sec. 15, referring to agreements to be disapproved); "any unfair or unjustly discriminatory contract with any shipper", "other discriminatory or unfair methods" (Sec. 14); "any other unjust or unfair device or means" (Sec. 16); "any rate . . . which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States", the Commission may "order enforced a just and reasonable regulation or practice" (Sec. 17); the carrier by water must establish "just and reasonable regulations and practices" (Sec. 18).

21. Compare the following from Pan American World Airways v. U. S., at p. 309: "The 'present and future needs' of our foreign and domestic commerce, regulations that foster 'sound economic conditions,' the promotion of service free of 'unfair or destructive competitive practices,' regulations that produce the proper degree of 'competition'—each of these is pertinent to the problems arising under Sec. 411.

It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in Sec. 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under Sec. 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U.S.C. Sec. 1486."

last quotation from Cunard—he has recommended that agreement No. 8200 be amended with changes to comply with his findings, "and that as amended Agreement No. 8200 should be reapproved."[22]

It seems to us to be wholly inappropriate that a court and jury should, while this proceeding still pends, inject themselves into this matter and undertake to say what portions of the existing agreement are good and what parts are bad.

WITH A VIEW TO UNIFORMITY IN REGULATION

Again, one prime purpose of the Shipping Act is to procure uniformity in the treatment of ocean carriers and their shippers. The Act is replete with provisions designed to avoid discrimination. See footnote 20, supra. To permit the maintenance of an action such as this would in our view produce for the shipping industry confusion worse confounded, destroy uniformity of interpretation and enforcement of the Shipping Act, and bring about the very type of discrimination which that Act was designed to avoid. We may assume that Carnation is not the only shipper who dislikes the rates fixed for shipment of its product. Carnation might win its suit and another similar concern, making a similar claim, might lose.

The undesirable results of a recovery by Carnation in such a case would be similar to those discussed by the Court in Keogh v. C. & N.W. Ry. Co., 260 U.S. 156, which was an action to

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22. The final paragraph in the examiner's report is as follows: "Based upon the whole record, it is concluded, ultimately, that Agreement No. 8200 has not operated to the detriment of the commerce of the United States or otherwise contravened Section 15 of the 1916 Act, but on the other hand it has been largely beneficial to such commerce; that it should be amended to incorporate the complete agreements found herein to be outside the scope of said agreement, with such changes made therein as will comport with the findings in this decision; and that as amended Agreement No. 8200 should be reapproved."

recover damages alleged to have resulted from a combination to fix railroad rates in restraint of interstate commerce. The complaint alleged that certain uniform rates, fixed by an association of railroads, were arbitrary and unreasonable and higher than those theretofore charged and higher than they would have been if competition had not been eliminated. The rates complained of had been duly filed with and approved by the Interstate Commerce Commission. It was held that Keogh, a private shipper, could not maintain his action for damages, and the action of the lower court in dismissing the case, was affirmed. It was noted that the shipper had recourse under the Interstate Commerce Act to secure redress for damages suffered in consequence of illegal rates. The Court said: "Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act?" The Court said: "This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under Sec. 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under Sec. 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief." Since the Shipping Act vests the Commission with these extensive powers to investigate and bring to a halt the "unjustly discriminatory" and "unfair" acts prohibited and practices which "operate to the detriment of the commerce of the United States", it may be said here, in the language of Pan American World Airways, supra, "if the courts

were to intrude independently with their construction of antitrust laws, two regimes might collide."

This necessity of attaining uniformity in the administration of a regulatory system such as here involved, was noted by Mr. Justice Brandeis in Gt. No. Ry. v. Merchants Elev. Co., 259 U.S. 285, 292, where speaking with reference to the functions of the Interstate Commerce Commission in relation to the construction of tariffs, he said that where a controversy involves any more than a pure question of law "the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained."

EXTENDING ALSO TO FOREIGN CARRIERS

Another reason why Congress must have intended to leave the resolution of the problems here present to this specialized commission is that the Shipping Act regulates not merely American shipping companies but foreign carriers as well. As noted by Marx,[23] the majority of shipping conferences are international in the sense that they consist of companies under various national flags. An examination of the list of defendants in this suit will disclose that a very large percentage of them are carriers operating under foreign flags and are foreign owned. Those carriers which are not American but which operate on routes between the United States and foreign countries are through the Shipping Act subject to a degree of regulation by this American Commission. The situation is to a degree similar to that mentioned in Pan American World Airways v. United States, supra, at p. 310, where the Court said: "Furthermore, many of the problems presented by

23. Marx, International Shipping Cartels: A Study of Industrial Regulation by Shipping Conferences, 1953, p. 137.

this case, which involves air routes to and in foreign countries, may involve military and foreign policy considerations . . ."[24]

ALL OF WHICH CALLS FOR ADMINISTRATIVE EXPERIENCE AND SPECIAL KNOWLEDGE

In its essence, the appellant's case is tied to its construction of the decision of the Court in Gt. No. Ry. v. Merchants Elev. Co., supra. Says the appellant: "As a matter of decision this case is controlled by Great Northern R. Co. v. Merchants Elevator Co., above, the case on which Cunard principally relied. This is an even simpler case. In that case there was a question of construction of a tariff. There was no need to resort to the Commission because that was a question of law. In the case at bar there is no need for construction of a tariff at all. We make a case without regard for the tariff terms, because we are concerned only with the illegal charge of $2.50 per ton above the lawful tariff whatever that tariff is."

In our view the case thus relied upon by the appellant has no relation to the problem here before us. That case had nothing to do with any problem arising under the Shipping Act. It was a simple action to recover sums paid the railway company alleged to have been collected in violation of the carrier's tariff. The sole question was whether Rule 10 of the tariff, as filed, called for a

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24. The Alexander Committee was not unmindful of this situation. Its report (V. 4 p. 416) stated: "The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors."

That the regulation of these conferences does indeed involve delicate foreign policy considerations is apparent from incidents in current history. As reported in the New York times of July 16, 1964, under Reuters dispatch from London, "Transport Minister Ernest Marples assailed the United States Maritime Commission for 'acting as if the United States has the right to regulate the affairs of the world as a whole' ". He offered a bill authorizing British ministers to order British ship lines "not to comply with American and other foreign shipping laws that the ministers consider an infringement on British jurisdiction." He was quoted as saying: "The Federal Maritime Commission claims the right to dictate to traders and shipowners in this country the form of contracts between them regardless of who owns the ships and where the contract is being negotiated."

reassignment charge of $5 a car for 16 cars of corn which were shipped from Iowa and Nebraska to a station in Minnesota where they were inspected and then rebilled to a station beyond. The sole question was what did the tariff provide and what did its text mean. As an apparent effort to suggest that the present case is like the Great Northern case, appellant asserts that this is "a simple overcharge case." We must disagree.

The whole thrust of the complaint in this case is that the defendants entered into agreements which differ from or were modifications of their filed and approved agreements, such as their Agreement 8200; that the agreements so entered into were required by law to be filed with and approved by the Commission; that this was not done; that pursuant to these unapproved agreements rates were agreed upon and fixed, and that in consequence of the failure to procure Commission approval, defendants were liable under the antitrust acts.

Cunard and Far East Conference, as we have noted, both hold that failure of approval does not affect the Commission's primary jurisdiction. But even if it did, the question would remain as to whether what defendants did amounted to agreements which required Commission approval. And that is something for the Commission to decide. If it should decide that defendants have been acting under agreements which should have been filed, but were not, the Commission under Sec. 22 of the Act, could adjudge a violation of the Act, as in Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n., 9 Cir., 314 F.2d 928. And, of course, the Commission, as we shall note hereafter, might find the conduct of the defendants in respect to the rates mentioned in the complaint was wholly within and authorized by the filed and approved agreements. But in passing upon these matters the Commission must necessarily employ a specialized judgment and a determination of fact, policy and law, not within the conventional experience of a judge or jury.

The same is true of the alleged agreement not to disclose to any shipper how the members of the Conference voted on rate requests.[25] Of course the Commission may well, under its broad powers to prohibit conduct which it finds to be "unfair" or to "operate to the detriment of the commerce of the United States", adopt a rule requiring disclosure of votes at conference meetings; but a determination of that kind would represent the sort of action which may properly be committed to an administrative body rather than to a court or jury.[26]

It is complained that the members of both conferences agreed that they would make no changes in rates which had been agreed to without the concurrence of both conferences. It is plain that the arrangement provided for by agreement No. 8200 contemplated joint action in the establishment of rates. It recited that for the accomplishment of the purpose of this agreement "it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates."

The agreement provided that certain actions should be determined only by a concurrence of the two groups "with respect to the establishment or change of rates." Obviously members of the Far East Conference carrying goods from Atlantic and Gulf ports would be affected by and interested in the rates from Pacific ports. Plainly that is why Agreement 8200 was made. The provision for joint action was eminently a reasonable one.

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25. We know of no present rule requiring meetings to be public. The Alexander report mentioned "the secrecy with which agreements and conferences are now conducted," (p. 417 of the Committee Recommendations) yet no effort was made in proposing the resultant legislation to prohibit such secrecy.

26. The determination of such a policy question would necessarily take into consideration the problem of whether publication of votes at meetings would be likely to result in the shippers granting their preferences in shipments to carriers who voted for rate reduction. That decisions of this kind are commonly "carefully kept business secrets" is noted in Marx, supra, p. 141. We are not aware of any Commission ruling on this subject.

Under Sec. 18 of the Shipping Act if the Commission found that any rate was unjust or unreasonable it could prescribe a reasonable maximum rate. This, again, is a matter for determination by the Commission. But, if the two Conferences agree to an increase of $2.50 per ton on evaporated milk, such was no more than a fixing of rates as contemplated in Agreement 8200. The Shipping Act sets up a system of industry self-regulation. No power to fix or specify rates was granted to the Commission or its predecessors. In contrast with the Interstate Commerce Commission (see 49 U.S.C. Sec. 15) the Maritime Commission does not fix rates. The rates were and are fixed by the Conferences under their approved agreement subject only to the power of the Commission just mentioned to set aside unjust or unreasonable rates.

It is also complained that the agreement contemplated that when the rates were announced Pacific Westbound Conference would falsely pretend to act under its Agreement No. 57. The terms of Agreement No. 57 are not in this record. Presumably it, as do most conference agreements, authorizes the fixing of rates by the Conference. Conceivably the Maritime Commission could establish a rule requiring such a conference, when it files its rates and charges with the Commission pursuant to Sec. 18 of the Shipping Act, to specify precisely under which particular approved agreement it is operating when it fixes such rates. We know of no such rule and nothing appears to show that under either Agreement 8200 or Agreement 57 the Conferences have any obligation to specify which approved agreement they are relying upon in fixing a particular rate.

As for the claim that the defendant Conferences entered into a new agreement "contrary to the provisions of said Agreement No. 57 and said Agreement No. 8200" that a rate established or fixed by or for Pacific Westbound Conference and its members would not be changed without the concurrence of Far East Conference, we have for inquiry the question whether such an

agreement was made in fact; whether, if made, it was contrary to Agreement No. 8200; and finally, whether it would be required to be filed with and approved by the Commission.

This calls for a reference to Agreement No. 8200 which was made a part of the record before the district court. We have noted that it expressly provided for and obviously contemplated the establishment of rates by agreements between both conferences. This approved agreement expressly provided that rates should be determined only by a concurrence of the two conferences each acting as a group and in accordance with the procedures prescribed by its conference agreement with respect to the establishment or change of rates. Paragraph "second" of that Agreement was a provision that if either Conference should determine that conditions affecting its operations required an immediate change in its tariffs it could notify the other group specifying the changes it proposed to put into effect 48 hours after giving such notice, if given by telegram, or 72 hours, if given by airmail. It provided for the giving of a summary of the facts which would justify such independent action.

At the times here in controversy there was nothing in the Shipping Act as it then stood or in the then regulations of the Commission requiring an insertion of such a stipulation in a Conference agreement.[27] The stipulation in this paragraph "second" was obviously inserted by voluntary action of the signatories to Agreement 8200. Its plain reading indicates that the exercise of this right of independent action is discretionary with the conference. Nothing contained therein compels utilization of that privilege and it would appear that the Commission, when it reaches this question, might well hold that the exercise of that privilege could be waived in any particular case; or, on the other hand, the Commission might well hold otherwise; and the Com-

27. When Sec. 15 was amended, Oct. 3, 1961, Pub. L. 87-346 Sec. 2, 75 Stat. 763, it contained a new provision that no agreement should be approved between carriers not members of the same conference unless "each conference retains the right of independent action."

mission might hold with respect to the rate referred to in the complaint here that Pacific Westbound Conference merely waived its right to take that independent action as it then had the right to do. Furthermore, the Commission could well find that this waiver was a single occurrence that there was no agreement never to use that right of independent action.[28]

The important point here is that these matters presented questions of fact and of policy properly for the specialized competence of the Commission. If the Commission finds that there was a mere temporary waiver of the independent action provision, and not a permanent alteration of the agreement, then it might hold that no filing of the new agreement would be required. The Commission has long recognized that not every arrangement or understanding between carriers must be filed for approval by the Commission.[29]

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28. The examiner's report, previously mentioned, recited that Pacific Westbound Conference did in fact invoke its right of independent action on one occasion involving Korean relief cargo and one other occasion in reducing rates on Kraft liner board. This would seem to negative any agreement never to act independently. In the hearing before the examiner the Conferences' position was that their privilege of independent action should be employed only in "serious" or "important" situations.

29. Its regulation, 46 C.F.R. Sec. 222.16, provides as follows: "Statements Not Accepted For Formal Filing. Statements of routine arrangements for carrying out authorized agreements will not be accepted for formal filing by the Board but may be received as information."

In an opinion by the predecessor shipping board, reported at U.S. Maritime Commision Reports Vol. 1, p. 121, consideration was given to the question as to whether the reference in Sec. 15 of the Shipping Act to the filing of "every" agreement was intended to include all arrangements made between carriers in the routine process of carrying out their conference agreements. The Board concluded that the agreements required to be filed are to be distinguished from the mere "routine" conference activities. If what we have here should be found by the Commission to have been a mere temporary waiver by Pacific Westbound Conference of its right of independent action in respect to the rate complained of in the complaint, then the Board might hold that no agreement of a character required to be filed had been entered into. That, however, is a matter for the expertise of the Commission. For a case involving the question of what constitutes a separate agreement required to be filed, see American Export & Isbrandtsen Lines, et al., v. Federal Maritime Commission, et al., (June 24, 1964) 9 cir., ... F. 2d ....

We must therefore conclude that what is involved here is the conduct of common carriers by water whose "business involves questions of an exceptional character, the solution of which may call for a high degree of expert and technical knowledge." (284 U. S. at 485) There is first the question of what did the Conferences here actually do. This should be decided, it seems plain, by the Commission which has already entered upon such an inquiry. The next question is whether or not what was done was of such character as to require the presentation for approval of a new agreement. Here we enter upon a matter "well understood by an administrative body especially trained and experienced in intricate and special facts and usages of the shipping trade." U. S. Nav. Co. v. Cunard S.S. Co., supra, at p. 485.[30]

And finally, under the decisions and the Cunard and Far East Conference cases, even if it should be held that a new agreement had been made here which required approval of the board, the exclusive primary jurisdiction is in the Board and not in the district court.

There is one question in the background of this case which we need not meet at this time. Some doubt is raised in our minds by the language used in the concluding portions of Far East Conference where the Court said (p. 576): "Having concluded that initial submission to the Federal Maritime Board is required, we may either order the case retained on the district court docket pending the Board's action, . . . or order dismissal of the proceeding brought in the District Court." The Court then went on to say "An order of the Board will be subject to review by a United States Court of Appeals, with opportunity for further review in this Court on writ of certiorari . . . . If the Board's

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30. We note in the examiner's report, previously mentioned, the following: "It is further found and concluded that the requirement that both conferences concur in matters voted on by said conferences is authorized by the approved basic agreement, and therefore is not in violation of said Section 15."

order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application." The Court then proceeded to order the district court suit to be dismissed as was the complaint in the Cunard case, where the Court used the words "exclusive preliminary jurisdiction."[31]

This language seems to suggest that there might be circumstances under which the final determination of the Commission would be such as to lay a ground work for a later antitrust suit, perhaps where there had been a complete and egregious failure even to attempt to comply with the Shipping Act.

On the other hand, in language which we have previously quoted, the Court in Cunard suggested that the intervening agreement there referred to "might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications." We would assume that if such action were taken by the Commission no antitrust proceedings would be in order.

We do not find it necessary to resolve this question as to whether there might ultimately arise out of the situation here presented a right to relief under the antitrust laws.[32] We hold that we should, under the circumstances of this case, follow the action taken by the Supreme Court in Far East Conference and approve the dismissal of the action by the district court.

The judgment is affirmed.

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31. For a discussion of the difference between what is there called "primary exclusive jurisdiction" and "primary non-exclusive jurisdiction", see "Antitrust and Regulated Industries", 38 New York University Law Review, 604, 615.

32. The only possible reason for allowing the action to be retained on the district court docket would be to avoid a claim that antitrust action was barred by the statute of limitations. Since we hold that such an action cannot at this date be maintained, this reason is not applicable here.

United States Court of Appeals for the Ninth Circuit

No. 18926

Carnation Company, a corporation,
Appellant,

vs.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, and other named persons,
Appellees.

UPON PETITION FOR REHEARING

Before CHAMBERS, POPE and JERTBERG, Circuit Judges.

Appellant's petition for rehearing discloses a failure to note the main thrust of the opinion which holds that appellant's action in the court below was properly dismissed on the ground that the matters complained of were within the primary jurisdiction of the Federal Maritime Commission.

Appellant has failed to note that we said: (immediately following the reference to footnote 16 on page 15 of the slip opinion) "In the exercise of its 'regulatory and remedial powers' to enforce the Act's 'pervasive regulatory scheme', it is for the Commission to pass upon the following questions: whether the defendants did or did not make certain agreements, whether those agreements, if made were such as to require Commission approval. . . ." Again we discuss this matter at great length (beginning at the middle of page 22 of the slip opinion, which will be the paragraph preceding West Publishing Company Key No. 5) where we said among other things: "Cunard and Far

East Conference, as we have noted, both hold that failure of approval does not affect the Commission's primary jurisdiction. But even if it did, the question would remain as to whether what defendants did amounted to agreements which required Commission approval. And that is something for the Commission to decide. If it should decide that defendants have been acting under agreements which should have been filed, but were not, the Commission under § 22 of the Act, could adjudge a violation of the Act, as in Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n., 9 cir., 314 F. 2d 928. And, of course, the Commission, as we shall note hereafter, might find the conduct of the defendants in respect to the rates mentioned in the complaint was wholly within and authorized by the filed and approved agreements. But in passing upon these matters the Commission must necessarily employ a specialized judgment and a determination of fact, policy and law, not within the conventional experience of a judge or jury." The point there made was discussed, both before and after the quoted language, at considerable length.

In short, we believe that the petition for rehearing is predicated upon a misunderstanding of our opinion. The petition is denied.

/s/ RICHARD H. CHAMBERS
/s/ WALTER L. POPE
/s/ GILBERT H. JERTBERG
United States Circuit Judges

Filed Sep 28 1964
Frank H. Schmid Clerk

Appendix B

STATUTES

Appendix B

STATUTES

[Copied from U.S.C.]

Sherman Act

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* * * * (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; 15 USCA § 1.)

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890; c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282; 15 USCA § 2.)

§ 8. The word "person", or "persons", wherever used in sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. (July 2, 1890, c. 647, § 8, 26 Stat. 210; 15 USCA § 7.)

Clayton Act

§ 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover

threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731; 15 USCA § 15.)

Shipping Act of 1916

[Material in brackets was removed by the 1961 amendments and matter in italics was added by those amendments.]

§ 1. When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: ***Provided,*** That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District or possession there-

of, or of any foreign country. * * * (Sept. 7, 1916, c. 451, § 1, 39 Stat. 728; July 15, 1918, c. 152, § 1, 40 Stat. 900; as amended Sept. 19, 1961, Pub. L. 87-254, § 1, 75 Stat. 522; 46 USCA § 801.)

§ 14. No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the

matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense. *Provided*, That nothing in this section *or elsewhere in this chapter, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 814 of this title by the regulatory body administering this chapter, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 814 of this title. The term "dual rate contract arrangement" as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree.* (Sept. 7, 1916, c. 451, § 14, 39 Stat. 733; June 5, 1920, c. 250, § 20, 41 Stat. 996; as amended Aug. 12, 1958, Pub. L. 85—826, § 1, 72 Stat. 574; 46 USCA § 812.)

§ 15. Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement [,] with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports

or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission [may] *shall* by order, *after notice and hearing,* disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, *or to be contrary to the public interest,* or to be in violation of this chapter, and shall approve all other agreements, modifications [,] or cancellations. *No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.*

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and main-

tain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

[Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.]

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and [All] agreements, modifications, [or] *and* cancellations [made after the organization of the Board] shall be lawful only when and as long as approved by the Commission*;* [, and] before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation [.]*; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.*

Every agreement, modification, or cancellation lawful under this section, *or permitted under section 813a of this title,* shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section *or of section 813a of this title* shall be liable to a penalty *of not more than* $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (Sept. 7, 1916, c. 451,

§ 15, 39 Stat. 733; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; as amended Oct. 3, 1961, Pub. L. 87-346, § 2, 75 Stat. 763; 46 USCA § 814.)

§ 16. It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever[.]*; Provided, that within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission*

shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense. (Sept. 7, 1916, c. 451, § 16, 39 Stat. 734; June 16, 1936, c. 581, 49 Stat. 1518; as amended Oct. 3, 1961, Pub. L. 87—346, § 6, 75 Stat. 766; 46 USCA § 815.)

§ 17. No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiv-

ing, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. (Sept. 7, 1916, c. 451, § 17, 39 Stat. 734; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USCA § 816.)

§ 18. *(a)* Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the Commission and after ten days' public notice in the form and manner prescribed by the Commission, stating the increase proposed to be made; but the Commission for good cause shown may waive such notice.

Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

(b) (1) From and after ninety days following October 3, 1961 every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, effect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count.

(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Com-

mission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: **Provided, however,** *That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.*

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foregoing commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

(6) Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (Sept. 7, 1916, c. 451, § 18, 39 Stat. 735; Ex. Ord. No. 6166, §12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; As amended Oct. 3, 1961, Pub. L. 87-346, § 4, 75 Stat. 764; 46 USCA § 817.)

§ 19. Whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the Federal Maritime Board finds that such proposed increase rests upon changed conditions other than the elimination of said competition. (Sept. 7, 1916, c. 451, § 19, 39 Stat. 735; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USCA § 818.)

§ 21. The Federal Maritime Board and the Secretary of Commerce may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment. (Sept. 7, 1916, c. 451, § 21, 39 Stat. 736; Ex. Ord. No. 6166, § 12 June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(5), 105(4), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1275, 1277; 46 USCA § 820.)

§ 22. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter. (Sept. 7, 1916, c. 451, § 22, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, § 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 821.)

§ 23. Orders of the Federal Maritime Board relating to any violation of this chapter shall be made only after full hearing,

and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the Federal Maritime Board, other than for the payment of money, made under this chapter, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Board, or be suspended or set aside by a court of competent jurisdiction. (Sept. 7, 1916, c. 451, § 23, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, Title IX, § 904, 49 Stat. 2016; Aug. 4, 1939, c. 417, § 1, 53 Stat. 1182; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 822.)

§ 29. In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise. (Sept. 7, 1916, c. 451, § 29, 39 Stat. 737; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 828.)

§ 30. In case of violation of any order of the Federal Maritime Board for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly

the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order. (Sept. 7, 1916, c. 451, § 30, 39 Stat. 737; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 829.)

Appendix C

COMPLAINT

In the United States District Court for the Northern District of California Southern Division

Civil Action—File No. 41153

* * * * * * *

Carnation Company, a corporation,
Plaintiff,

vs.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association; the following corporations, individually and as members of said associations (as hereinafter appears):[1]
Defendants.

COMPLAINT FOR DAMAGES AND OTHER RELIEF ON ACCOUNT OF VIOLATION OF THE ANTITRUST LAWS OF THE UNITED STATES

Comes now Carnation Company, a corporation, and complaining of the defendants brings this civil action against defendants based upon defendants' violation of the antitrust laws of the United States and for treble the amount of damages suffered by it by reason of defendants' violations of the antitrust laws of the United States, and in this behalf shows as follows:

1. This action is brought for treble damages and arises under the Act of Congress of July 2, 1890, c. 647, 27 Stat. 209 as amended (15 USC §§ 1-7, commonly known as the Sherman Antitrust Act), and the Act of Congress of October 15, 1914, c. 323,

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1. The names of the other defendants are set out in the body of the Complaint (par. 6-8) and, accordingly, are not repeated here.

38 Stat. 730, as amended (15 USC §§ 12-27, commonly known as the Clayton Act). The jurisdiction of this Court is invoked under the provisions of said statutes and the laws of the United States in such cases made and provided.

2. This action is brought against the defendants above named and hereinafter identified. Statements herein in the present tense refer to, and are made as of, all times herein mentioned except when hereafter specific and particular times are stated.

3. Each of the defendants, except as hereinafter stated, maintains an office, transacts business, has an agent and/or is found within the above named District and Division.

4. The evaporated milk manufactured, sold and shipped by plaintiff, as hereinafter stated, regularly moves by common carrier by water from Pacific Coast ports of the United States to the Philippine Islands in commerce and trade with foreign nations. The defendants other than Pacific Westbound Conference, Far East Conference, Dennean and Galloway are herein sometimes referred to as the carrier defendants. The business of the carrier defendants is the business of providing transportation as carriers by water in commerce with foreign nations. The price fixing combination and conspiracy and the price fixing hereinafter averred was in respect of said business of said carrier defendants and operated directly in and on and restrained said business and on the transportation of evaporated milk manufactured, sold and shipped as aforesaid by plaintiff, and restrained commerce and trade with foreign nations.

5. Plaintiff, Carnation Company, is a Delaware corporation, licensed to do business and doing business in the State of California and in the above District and Division. It has its principal office in the State of California. It is engaged in the business, among other things, of manufacturing and processing fluid milk into evaporated milk, packing said evaporated milk and selling and shipping it in trade and commerce with foreign nations. More

particularly plaintiff so sells said evaporated milk to buyers in the Philippine Islands and so ships it from Pacific Coast ports of the United States to the Philippine Islands and to said buyers in the Philippine Islands by carriers by water and by carrier defendants who served said trade and who are members of the Pacific Westbound Conference. The evaporated milk shipped by plaintiff as hereinafter averred was so shipped and transported.

6. Defendants N. V. Stoomvaart Maatschappij "Nederland", Koninklijke Rotterdamsche Lloyd N. V., Skibsaktieselskapet Arizona, Skibsaktieselkapet Astrea, Skibsaktieselskapet Aruba, Skibsaktieselskapet Noruega, Skibsaktieselskapet Abaco and A/S Atlantica are corporations associated together in business and doing business under the name Java Pacific & Hoegh Lines—Joint Service. Defendants Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskapet International, Skibsaktieselskapet Mandeville and Skibsaktieselskapet Goodwill are corporations associated together in business and doing business under the name Klaveness Line—Joint Service. Defendants Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth, Skibsaktieselskapet Ogeka and Hvalfangstaktieselskapet Suderoy are corporations associated together in business and doing business under the name Knutsen Line—Joint Service. Defendants Skipsaktieselskapet Nordheim, Skipsaktieselskapet Vito, Skipsaktieselskapet Kirkoy, Skipsaktieselskapet Skagerek (Ditley-Simonsen Lines) and Transatlantic Steamship Company, Ltd., of Gotbenburg are corporations associated together in business and doing business as Pacific Orient Express Line—Joint Service. Defendants American Mail Line, Ltd., Mitsubishi Shipping Co., Ltd., Nippon Kisen Kaisha, Ltd. (sometimes doing business as and known as Nissan Pacific Line), Nitto Shosen Co., Ltd., Pacific Far East Line, Inc.,

Pacific Transport Lines, Inc., States Steamship Company, Trans-ocean Transport Corp. (sometimes doing business as Magsaysay Lines), Canadian Pacific Railway Company, The East Asiatic Company, Ltd., Compagnie Maritime des Chargeurs Reunis, Orient Steam Navigation Co., Ltd., and P. & O.-Orient Lines are corporation. In and after January 1953 said defendants were common carriers by water in foreign commerce and as such provided transportation by water in such commerce from the Pacific Coast ports of the United States to the Far East, and particularly Manila in the Philippine Islands, for various commodities including evaporated milk.

7. Defendants Ellerman Lines, Limited, Ellerman & Bucknall Steamship Co. Limited, The City Line, Limited, and Hall Line, Limited, are corporations associated together in business and doing business as Ellerman & Bucknall Associated Lines—Joint Service. Defendants Nissan Kaisen Kaisha, Ltd., Toho Kaiun Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Mitsubishi Kaiun Kaisha, Ltd., and Kokusai Kaiun Kaisha, Ltd., are corporations associated together in business and doing business as Kokusai Line—Joint Service. Defendants The Bank Line, Lykes Bros. S.S. Co., Inc., Mitsubishi Kaiun Kaisha, Ltd., Orient Mid-East Lines, Prince Line Ltd. and United States Lines Company are corporations. In and after January 1953 said defendants were carriers by water from Atlantic Coast and Gulf of Mexico ports of the United States to the Far East.

8. Defendants The De La Rama Steamship Co., Inc., The Swedish East Asia Co., Ltd., The Ocean Steamship Co., Ltd., The China Mutual Steam Navigation Company, Ltd., and Nederlandschi Stoomvaart Maatschappij "Oceaan" N. V. are corporations associated together in business and doing business as De La Rama Lines—Joint Service. Defendants Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteres-

sentskabet Garonne, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, Aktieselskabet Standard and Fearnley & Egers Befragtningsforretning A/S are corporations associated together in business and doing business as Fern-Ville Far East Lines—Fearnley & Eger and A. F. Klaveness & Co. A/S. Defendants Skibsaktieselskapet Igadi, Aktieselskapet Ivarans Rederi, A/S Besco and A/S Lise are corporations associated together in business and doing business as Ivaran Lines—Far East Service—Joint Service. Defendants Dampskibsselskabet Af 1912, Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg are corporations associated together in business and doing business as A. P. Moller—Maersk Line—Joint Service. Defendants A/S Den Norski Afrika-Og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI are corporations associated together in business and doing business as Wilhelmsens Dampskibsaktieselskab. Defendant American President Lines, Ltd., Compagnie De Transports Oceaniques, Daido Kaiun Kaisha, Ltd., Isthmian Lines, Inc., Kawasaki Kisen Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Maritime Company of the Philippines, Inc., Mitsui Steamship Company, Ltd., Nissan Kaisen Kaisha, Ltd., Nippon Yusen Kaisha (also known as N. Y. K. Line), Osaka Shosen Kaisha, Ltd., Pacific Transport Lines, Inc., Philippine National Lines, Shinnihon Steamship Co., Ltd., States Marine Lines, Inc. (also known as Global Bulk Transport Corporation), States Marine Corporation, States Marine Corporation of Delaware, United Philippine Lines, Inc., Waterman Steamship Corporation and Yamashita Kisen Kaisha are corporations. In and after January 1953 said defendants were common carriers by water in foreign commerce and as such provided transportation by water in such commerce from the Atlantic Coast, Gulf of Mexico and Pacific

Coast ports of the United States to the Far East, and particularly Manila in the Philippine Islands, for various commodities including evaporated milk.

9. Before January 1953 common carriers by water in foreign commerce, providing water transportation as such from Pacific Coast ports of the United States and of Canada to the Far East (including Manila in the Philippine Islands) and as such carriers serving the trade from said ports of the United States and Canada to the Far East, associated themselves together in a conference and under and pursuant to the terms of a written agreement known as Pacific Westbound Conference Agreement No. 57 formed the defendant voluntary association and conference, known as the Pacific Westbound Conference (hereafter referred to as PWC), for the purpose of acting as a group to regulate said commerce and the transportation service of said trade and particularly for the purpose of fixing, by tariffs by and through said association and conference, the rates at which the members of said association and conference would serve said trade by transportation of commodities in said trade and commerce. PWC is a conference only of carriers serving said trade. In and by said Agreement No. 57 it was provided that PWC should fix said rates and issue a tariff thereof. Said agreement was filed for approval with, and was approved by, the United States Shipping Board agreeably to the provisions of section 15 of the Shipping Act, 1916 and thereafter remained approved and in full force and effect. Only carriers serving said trade from Pacific Coast ports of the United States and of Canada to the Far East are members of PWC. Thereafter the rates of the members of defendant PWC for transportation of commodities in said trade and commerce and from the Pacific Coast ports of the United States to the Far East (Manila, Philippine Islands, included), including the rates applicable to the transportation of evaporated milk, were fixed by

PWC acting agreeably to and under said Agreement No. 57, except as hereinafter averred.

10. In and after January 1953 the carrier defendants named in paragraphs 6 and 8 were parties to said Agreement No. 57 and members of defendant PWC. None of the carrier defendants named in paragraph 6 above was or is a member of defendant Far East Conference. In and after January 1953 defendant W. C. Galloway was Chairman of defendant PWC.

11. Since before January 1953 the members of defendant PWC were the only common carriers by water providing general cargo and regular berth service and transportation service on substantially regular routes and with regular sailings, from Pacific Coast ports of the United States to the Far East.

12. Since before January 1953 defendant PWC has maintained its headquarters and its office and has conducted its business at San Francisco, California. At no time was it a carrier or a common carrier or in the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with any common carrier by water. Its business was and is, among other things, that of investigating and accumulating data with respect to the business of transportation by water from Pacific Coast ports of the United States to the Far East, including rates to be charged for such service and of fixing rates for such service by its members.

13. Before January 1953 carriers by water providing transportation service from the Atlantic Coast and Gulf of Mexico ports of the United States to the Far East (including Manila in the Philippine Islands) and as such carriers serving the trade from said ports of the United States to the Far East, associated themselves together in a conference and formed the defendant voluntary association and conference known as Far East Conference (hereafter referred to as FEC) for the purpose, among other things, of fixing transportation rates for transportation in said trade by its members who served said trade. Only carriers serving

said trade from the Atlantic Coast and Gulf of Mexico ports of the United States to the Far East are members of said association and conference and FEC is a conference only of carriers serving said trade. In and after January 1953 the carrier defendants named in paragraph 7 and 8 above were members of said association and conference, and none of the defendants named in paragraph 7 above was a member of defendant PWC. Defendant James A. Dennean is Chairman of defendant FEC.

14. At no time was defendant FEC a carrier or a common carrier or in the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with any common carrier by water. Its business was and is that, among other things, of acting for its members in connection with the fixing of rates for transportation of commodities, by carriers by water from Atlantic Coast and Gulf of Mexico ports of the United States to the Far East as herein stated and at no time was it lawfully authorized or empowered to fix any rates from Pacific Coast ports of the United States nor was it agreed that it should have any part in fixing said rates except as averred in paragraph 18 below.

15. The carrier defendants are sued herein individually and as members of the association or associations of which they were members as herein stated.

16. The business and trade in commodities from the Atlantic Coast and Gulf of Mexico ports of the United States to the Far East is naturally competitive with the business and trade in commodities from the Pacific Coast ports of the United States to the Far East and PWC and FEC are conferences of carriers serving said different trades that are naturally competitive and would in fact be competitive and the transportation services for said different trades would be competitive and is competitive except as restrained as herein stated.

17. In November 1952 defendants, who were members of PWC, and defendants, who were members of FEC, entered into an agreement in writing, known as Agreement No. 8200, wherein and whereby it was provided that said defendant members of defendant PWC and of defendant FEC should meet and make rules for joint action by said defendants which should include "the provision of machinery for the change of any rates, rules and regulations", but wherein and whereby it was provided that defendant PWC retained the right of independent action in respect of rates and that if defendant PWC "should determine that conditions affecting its operations require" a "change in its tariffs" it might notify defendant FEC of such proposed change, specifying the change, and thereafter and after the expiration of a maximum time of 72 hours after such notice defendant PWC "may make such changes". In and by said Agreement No. 8200 it was further provided that said agreement should not apply to 12 named commodities when shipped in bulk, referred to as "excepted commodities". Evaporated milk was not specified as one of said "excepted commodities". Said Agreement No. 8200 was filed for approval by, and was approved by, the Federal Maritime Board.

18. The provisions of said Agreements No. 57 and No. 8200 notwithstanding and contrary thereto, in January 1953 defendants met at Santa Barbara, California, and then and there secretly and unlawfully associated themselves together and secretly and unlawfully combined, conspired and agreed to restrain commerce with foreign nations and to act and to fix rates for transportation of commodities, by the defendant carriers who were members of defendant PWC, from Pacific Coast ports of the United States to the Far East, not as provided in said Agreement No. 57 and not as provided in said Agreement No. 8200, and thereafter, said Agreements No. 57 and No. 8200 being still in effect, met and secretly and unlawfully renewed and continued said association,

combination, conspiracy and agreement, and so associated together and so combining, conspiring and agreeing, agreed as follows:

(a) That neither defendant PWC nor defendant FEC nor any member of either of said Conferences should disclose to any shipper information regarding rate changes and/or the position of either Conference or of any member of either Conference regarding rate requests, and agreed to a written "Joint Memorandum of Decisions" wherein and whereby it was provided "that unauthorized disclosure to shippers of information regarding rate changes and/or the position of an individual Conference or any Member thereof, regarding rate requests is contrary to the spirit of the Joint Agreement";

(b) That defendants (and not PWC alone agreeably to said Agreement No. 57) would fix and agree upon the rates for transportation of commodities by water by members of defendant PWC in said trade from Pacific Coast ports of the United States to the Far East (the Philippine Islands included) and that the rates so fixed and agreed upon should then be given out and to shippers by defendant PWC falsely pretending to act as such and under said Agreement No. 57 and should be adhered to and charged by defendants providing transportation by water from Pacific Coast ports of the United States to the Far East and the Philippine Islands;

(c) That defendant PWC, contrary to the provisions of said Agreement No. 57 and said Agreement No. 8200, would make no change in any rate established by it or fixed as aforesaid and to be charged by its members for transportation of commodities by water from Pacific Coast ports of the United States to the Far East (Manila, Philippine Islands included), without the concurrence of defendant FEC, except a rate for a commodity included in a list established by defendants acting pursuant to said secret and unlawful association, combination, conspiracy and agreement and known as a "list of initiative items" in respect of which defendant PWC

might establish rates without the concurrence of defendant FEC; and

(d) That certain specified commodities should be on the said list of initiative items.

19. The above referred to list of initiative items did not include condensed and/or evaporated milk until "Item No. 1350—Milk, condensed and evaporated" was included in said list by joint action of defendants in May 1961, as hereinafter averred.

20. The said association, combination and conspiracy referred to in paragraph 18 above never submitted to the jurisdiction of the Federal Maritime Board or its successor the Federal Maritime Commission and was never a carrier or a common carrier, by water or otherwise, and never carried on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. There was never filed with said Board or Commission nor filed with said Board or Commission for approval, nor approved by it, said agreement averred in paragraph 18 above, or a true copy thereof, or any true or complete or any memorandum thereof.

21. Defendants, associated together and combining, conspiring and agreeing as hereinabove averred and while said Agreements No. 57 and No. 8200 were in effect, did the things they had combined, conspired and agreed to do and the things hereinafter averred to have been done by them and for that purpose and for the purpose of carrying out the association, combination, conspiracy and agreement referred to in paragraph 18 above agreed upon and fixed rates for transportation by water from Pacific Coast ports of the United States to the Far East, and in so acting and issuing rates for evaporated milk as hereinafter alleged, acted by and through defendant PWC at San Francisco, California.

22. In 1951 PWC, acting agreeably to said Agreement No. 57 fixed and established the rates to be charged by its members for transportation of evaporated milk by water from the Pacific Coast

ports of the United States to the Philippine Islands. Said rates were adhered to and charged by the members of PWC except as hereinafter averred. Before May 1957 defendants, acting as alleged in paragraph 18 above, agreed that the rates for transportation by water by members of defendant PWC from Pacific Coast ports of the United States to the Philippine Islands for evaporated milk should be increased by $2.50 per ton and that defendant PWC, pretending to act agreeably to the provisions of said Agreement No. 57, should state and circulate said increase as effective May 1, 1957.

23. Before May 1, 1957, and effective as of May 1, 1957, PWC did, in fact, so announce and circulate said increase in said rates, and over plaintiff's protest defendants put into effect and applied said increased rates. In so doing defendants falsely pretended that PWC was acting lawfully and agreeably to said Agreement No. 57. In truth and in fact, in so doing, defendants were acting agreeably and pursuant to said unlawful combination, conspiracy and agreement averred in paragraph 18 above and the said agreement of defendants averred in paragraph 22 above. Said increased rates were thereafter charged and collected from plaintiff by the members of PWC for transportation by water of evaporated milk from the Pacific Coast ports of the United States to the Philippine Islands, until said rates were reduced as hereinafter stated.

24. In November 1957, plaintiff, in order to help it in meeting European competition in the sale of evaporated milk in the Philippine Islands and upon that ground which was then stated to defendant PWC, requested of defendant PWC that it reduce said increased rates on evaporated milk by $2.50 per ton and reduce them to the rates established and in effect before May 1, 1957.

25. Acting upon said request of plaintiff and on February 19, 1958, defendant PWC determined that said request should be

granted and that the said rates on evaporated milk should be reduced as requested subject, however, to the concurrence of defendant FEC and thereupon requested of defendant FEC that it concur in said reduction. Defendant FEC declined to concur in said reduction so requested by defendant PWC and defendant PWC thereupon, and agreeably to the association, combination, conspiracy and agreement hereinabove averred in paragraph 18, withdrew its said request for concurrence and no reduction in said rates was made except as hereinafter stated.

26. Thereafter defendant PWC, by writing, advised plaintiff that plaintiff's said request for reduction of the rates on evaporated milk was refused and represented to plaintiffs as follows: "The members of the Pacific Westbound Conference have given long and careful study to your request that the rate for canned milk be reduced by $2.50 per ton. * * * our member lines were initially disposed to grant a reduction in the rate * * * This position has, however, been again reviewed and the required majority of the lines are now of the view that a reduction in the ocean freight rate would not materially affect the competitive position of American versus European supplier. * * * This entire matter has nevertheless again been carefully reviewed and the members of this Conference have agreed that at this time no further downward adjustment can be made in the freight rate applicable to canned, condensed and evaporated milk in the United States to Orient trade." Said statement and representation was false, and was then known to defendant PWC to be false, and defendant PWC then knew, and it was the fact, that plaintiff's said request for reduction of rates, as aforesaid, was declined by reason of the refusal of defendant FEC to concur in the said reduction. Said statement and representation was made agreebly to the association, combination, conspiracy and agreement averred in paragraph 18, and to that part thereof that "information regarding rate changes and/or the position of an individual Conference

or any Member thereof regarding rate requests" not be disclosed to shippers.

27. Plaintiff had no knowledge of said secret association, combination, conspiracy or agreement or of the reason for said increase in the said rates on evaporated milk or of the true reason why its request for reduction of the said rates was declined, or of any facts which might have lead to the discovery of those facts until it first became aware of the facts in May 1961 through disclosure made in May 1961 in the course of a proceeding being conducted by the Federal Maritime Board and its successor and could not have discovered the same earlier by reason of the agreement of defendants that the said facts be kept secret and by reason of the fact that defendants did in fact keep them secret from shippers as they had agreed to do, and theretofore plaintiff had in fact relied upon the representations made to it by defendant PWC.

28. The said rates on evaporated milk fixed and increased as aforesaid were kept in force and effect until May 7, 1962. In May 1961, defendants agreed that condensed and evaporated milk be included on the list of initiative items hereinabove referred to, and thereupon condensed and evaporated milk were so included as "Item No. 1350 Milk, Condensed and Evaporated". Thereafter effective on May 7, 1962 defendant PWC reduced the rates on evaporated milk for transportation by water from the Pacific Coast ports of the United States to the Philippine Islands by $2.50 per ton and to the rates which had applied prior to May 1, 1957 and after May 7, 1962 the said reduced rates were charged and collected for said transportation.

29. From before May 1, 1957, plaintiff sold to buyers in the Philippine Islands and shipped to Manila in the Philippine Islands from Pacific Coast ports of the United States evaporated milk and did so by defendant carriers who were members of defendant PWC. Plaintiff was forced to so ship by said defendant carriers

by reason of the fact that said defendant carriers were the only carriers providing the type of transportation herein alleged to have been provided by them and were the only carriers by whom plaintiff, in the course of its said business, could ship to the Philippine Islands. For said shipments plaintiff was charged, and was forced to and did pay, the rates for transportation of evaporated milk fixed and made effective as hereinabove alleged. Plaintiff did not increase the price at which it sold its said evaporated milk in the Philippine Islands by reason of the said increased ocean freight rates which it was required to and did pay.

30. By reason of the premises and as a result of the aforesaid unlawful association, combination, conspiracy and agreement in violation of the antitrust laws of the United States and the aforeaverred violations by the defendants of the antitrust laws of the United States and the aforesaid exacting from plaintiff the aforesaid increase in rates on evaporated milk plaintiff has been injured in its business and property in the amount of Three Hundred Forty-three Thousand Two Hundred Seventy-six and 70/100 Dollars ($343,276.70). It has been necessary for plaintiff to employ, and it has employed, attorneys to bring and prosecute this action under the antitrust laws of the United States.

Wherefore plaintiff prays:

1. That the association, combination, conspiracy and agreement of defendants, and their conduct and acts in pursuance thereof be decreed violations of the antitrust laws of the United States; and

2. That plaintiff do have and recover from defendants its damages in the sum of Three Hundred Forty-three Thousand Two Hundred Seventy-six and 70/100 Dollars ($343,276.70) trebled to One Million Twenty-nine Thousand Eight Hundred Thirty and 10/100 Dollars ($1,029,830.10) agreeably to the antitrust laws of the United States; plus

3. Plaintiff's cost of suit, including a reasonable attorney's fee; and have

4. Such other, further and different relief as, the premises considered, is proper.

ARTHUR B. DUNNE
WALLACE R. PECK
JAMES R. BAIRD, JR.
WILLIAM H. BIRNIE
DUNNE, DUNNE & PHELPS

By /s/ ARTHUR B. DUNNE
Arthur B. Dunne

Attorneys for Plaintiff
Carnation Company

Appendix D

FEDERAL MARITIME BOARD AGREEMENT No. 8200

Federal Maritime Board
Agreement No. 8200
Far East Conference
and
Pacific Westbound Conference

Agreement made in the City of New York this fifth day of November, 1952, by and between the parties who shall execute this Agreement at the foot hereof under the caption "Members of the Pacific Westbound Conference", who are hereinafter sometimes collectively referred to as the Pacific Lines, and the parties who shall execute this Agreement at the foot hereof under the caption "Members of the Far East Conference", who are hereinafter sometimes collectively referred to as the Atlantic Gulf Lines.

WITNESSETH:

1. The Pacific Lines are parties to an agreement which has been designated Federal Maritime Board Agreement No. 57, as amended, which designates the parties thereto as the Pacific Westbound Conference; and whenever reference is hereinafter made to action which is required or permitted to be taken by the Pacific Lines, such reference is intended to refer to action such as is required to effect the establishment or change of rates pursuant to said Agreement No. 57, as amended.

2. The Atlantic/Gulf Lines are parties to an agreement which has been designated Federal Maritime Board Agreement No. 17, as amended, which designates the parties thereto as the Far East Conference; and whenever reference is hereinafter made to action which is required or permitted to be taken by the Atlantic/Gulf Lines, such reference is intended to refer to action such as is re-

quired to effect the establishment or change of rates pursuant to said Agreement No. 17, as amended.

3. The Pacific Lines operate vessels as common carriers of cargo from Pacific Coast ports of the United States and Pacific Coast ports of Canada to certain ports in the Far East; and the Atlantic/Gulf Lines operate vessels as common carriers of cargo from United States Atlantic and Gulf ports to some of the same ports in the Far East; and action taken hereunder shall apply to transportation of cargoes to all destinations which shall, from time to time, be common to the scope of both Agreements 57 and 17.

4. The purpose which the parties desire to accomplish hereby (which is hereinafter sometimes for brevity referred to as "the purpose of this agreement") is to assure to the parties hereto, as well as to the manufacturers, merchants, farmers and labor, whose products are exported from the United States to Far East destinations which may, from time to time, be common to the scope of both said Agreements 57 and 17, stability of ocean rates and frequency, regularity and dependability of service which is essential to their continued prosperity; and for the accomplishment of the purpose of this agreement it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates, except for the following commodities when shipped in bulk:

Coal	Barley
Coke	Rice
Phosphate Rock	Corn
Salt	Soya Beans
Ores	Oats
Wheat	Rye

which expected commodities are not included within the scope of this agreement.

Now, Therefore, in consideration of the premises and of the mutual undertakings of the parties hereto, it is hereby agreed as follows:

First: As promptly as possible after the approval of this agreement by the Federal Maritime Board, the parties shall hold a meeting which is hereinafter referred to as the "initial meeting." The initial meeting shall be held at a time and place to be mutually agreed upon by the parties hereto. If, however, prior to the 30th day after such approval the parties hereto shall not so have mutually agreed upon the time and place for the holding of the initial meeting, said initial meeting shall be held on the 40th day after such approval at the Fairmont Hotel in the City of San Francisco, California; and if such 40th day shall fall on a Saturday, Sunday or legal holiday, said meeting shall be held on the second business day thereafter, at the same place. Such meeting shall be attended by representatives of the Pacific Lines and of the Atlantic/Gulf Lines. All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the Pacific Lines, acting as a group, and of the Atlantic/Gulf Lines, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates. The initial meeting shall make rules, not inconsistent with the provisions of this agreement, for the conduct of all meetings to be held hereunder, and for the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting.

Second: Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of Lines should determine that conditions affecting its operations require an

immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by air mail, and a summary of the facts which justify the changes on said short notice. Forty-eight hours, or 72 hours, after the giving of such notice, dependent upon the medium by which such notice shall have been given, the notifying group may make such changes as stated in said notice and the other group may, at the end of 48 hours, or at the end of 72 hours, as the case may be, after the giving of such notice, make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or violation of this agreement. The parties shall, however, promptly give to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, copies of any notices and information with respect to any changes in tariffs given or made as provided for in this Article Second.

Third: The parties hereto shall, promptly after the adjournment of the initial meeting and of each subsequent meeting, file with the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, a record of all business transacted at said respective meeting.

Fourth: Neither the Pacific Lines nor the Atlantic/Gulf Lines shall admit new parties to their Conference Agreement unless such parties shall simultaneously become parties to this agreement by affixing their signatures under the appropriate caption or captions at the foot of this agreement or a counterpart thereof. Whenever any party hereto shall have ceased to be a party to Agreement No. 57 as amended, or a party to Agreement No. 17 as amended, or a party to both of said agreements, as the case may be, such party by such cessation shall cease also to be a party to this agreement; but so long as such party shall continue to be a party to

either said Agreement No. 57 as amended, or Agreement No. 17 as amended, it shall also continue to be a party to this agreement. Prompt notice of the change of parties hereto shall be given by each group to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended.

Fifth: Any notice required or permitted hereby to be given shall be given by telegram if telegraphic communication be available, otherwise by air mail, and if given to the Pacific Lines shall be addressed to the Secretary-Manager of the Pacific Westbound Conference at San Francisco, California, and if given to the Atlantic/Gulf Lines shall be addressed to the Chairman of the Far East Conference, 11 Broadway, New York 4, New York. The deposit of any such notice air mail, postage prepaid, in a United States Post Office letter box, or the deposit of any such telegram in an office of any telegraphic company, as the case may be, shall constitute the giving of such notice. Each of the groups of lines may, from time to time, change the address to which notices to it are to be dispatched by notice given to the other group.

Sixth: This agreement shall become effective when, but not until, the same shall have been approved by the Federal Maritime Board, pursuant to the provisions of Section 15, Shipping Act, 1916, as amended.

Seventh: Each Line, a party hereto, shall bear the expenses of its own representatives while attending any meetings held under the provisions hereof. The expenses of hiring the places where the meetings shall be held and such expenses incidental thereto as may be for the joint benefit of all of the parties hereto, shall be borne to the extent of one half thereof by the Pacific Lines as a group and one half thereof by the Atlantic/Gulf Lines as a group.

Eighth: This agreement shall continue in effect for a period of nine months and shall continue thereafter until the ninetieth day after any one or more of the Lines, a party or parties hereto,

shall have given to the Pacific Lines and to the Atlantic/Gulf Lines and to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, notice of termination; and on said ninetieth day this agreement shall terminate and come to an end.

In Witness Whereof, the parties hereto have caused this agreement to be executed by their respective officers or representatives and duly authorized as of the day and year hereinabove first written.

[Signatures of members of the two conferences omitted]

Varsity Warehouse, [illegible]

On Petition for a Writ of Certiorari [illegible]
United States Court of Appeals for the [illegible]

Brief in Opposition [illegible]
East [illegible]
Yale [illegible]
[illegible]

[illegible]
New York, N.Y. [illegible]

INDEX AND TABLE OF CASES

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Cases:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 657

CARNATION COMPANY,

Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS, FAR EAST CONFERENCE, AND MEMBERS AND CERTAIN FORMER MEMBERS THEREOF NAMED AS DEFENDANTS

Opinions Below

Since the petition was filed, the opinion of the United States Court of Appeals for the Ninth Circuit and its memorandum denying petitioner's petition for a rehearing have been reported, *sub nom. Carnation Company* v. *Pacific Westbound Conference,* 336 F. 2d 650.

The Question Presented

We do not agree with petitioner's prolix statement of questions presented and claimed errors (Petition, pp. 4-7). The single question presented by the petition should, we submit, be stated as follows:

> Did not the Court of Appeals correctly hold that the complaint herein, which seeks damages under the antitrust laws on the claim that respondents, common carriers by water in the foreign commerce of the United States subject to §15 of the Shipping Act, 1916, 39 Stat. 733, as amended (46 U.S.C. §814), by concerted action enhanced freight rates charged to petitioner, had been properly dismissed on the ground that the antitrust laws have been superseded, *pro tanto,* by the Shipping Act, and that under the Shipping Act the exclusive primary jurisdiction of the subject matter is confided to the Federal Maritime Commission?

Statement of the Case

Petitioner, at all stages of this litigation, has argued that its claim is one for an overcharge (Petition, p. 2). Convenient as this may be to support petitioner's claim that this is not the kind of case which requires the application of the supersession and primary jurisdiction doctrines, it is fairly apparent from the complaint that the relief sought is not based on an overcharge theory.

The gravamen of the complaint is the enhancement of rates charged to the petitioner by reason of con-

certed action of the respondent carriers, which petitioner claims to have been unlawful concerted action (Complaint, ¶¶18, 25, 26; R. 16-17, 19-20[1]). It is only by such charge of unlawful concerted action that petitioner could lend even the color of antitrust violation to its claim.

It is undisputed that the respondents are common carriers by water in the foreign commerce of the United States, and two conferences of such carriers and the chairmen thereof; that the Pacific Westbound Conference (hereinafter, "PWC"), acting pursuant to a conference agreement duly approved under §15 of the Shipping Act, 1916, 39 Stat. 733, as amended (46 U.S.C. §814), establishes rates, charges, and regulations pertaining thereto for the transportation by its member carriers of property from Pacific Coast ports of the United States to various destinations in the Far East, including ports in the Republic of the Philippines; that the Far East Conference (hereinafter, "FEC"), acting pursuant to an agreement similarly approved, establishes the rates, charges, and regulations pertaining thereto for the transportation of property by its member carriers from Atlantic and Gulf Coast ports of the United States to various Far East destinations, including ports in the Republic of the Philippines; and that, pursuant to an agreement (F.M.C. Agreement No. 8200 (hereinafter, the "Joint Agreement")), FEC and PWC have been authorized to take joint action with respect to rates (Complaint, ¶¶9, 13, 17; R. 8-9, 9-10, 10-11, 16).

Effective May 1st, 1957, PWC announced an increase in its rates, including an increase of $2.50 per

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[1] References to the record certified by the Clerk of the Court of Appeals are cited as "R".

ton applicable to the transportation of evaporated mi
from Pacific Coast ports of the United States to por
in the Republic of the Philippines (Complaint, ¶2
R. 19). At the request of Carnation Company, t
petitioner herein and an exporter of evaporated mil
PWC decided to reduce its evaporated milk rate
$2.50 per ton. PWC requested the concurrence
FEC in said reduction. FEC declined concurren
Thereafter, and until May of 1962, Carnation paid t
PWC rate, including the May, 1957, increase of $2.
per ton, on all evaporated milk shipped by it fro
Pacific Coast ports of the United States to the Repu
lic of the Philippines (Complaint, ¶¶24, 25, 28, 2
R. 19-20, 21).

According to paragraph 30 of the Complaint (R. 22
"By reason of the premises and as a result of t
aforesaid unlawful association, combination, consp
acy and agreement in violation of the antitrust la
of the United States and the aforeaverred violatio
by the defendants of the antitrust laws of the Unit
States and the aforesaid exacting from plaintiff t
aforesaid increase in rates on evaporated milk plaint
has been injured", etc. Thus, in its own pleadin
petitioner has characterized its claim for relief as o
based upon the combined and concerted activities
the respondent common carriers by water, and h
predicated its right to a judgment upon the antitru
laws of the United States. There is no assertion th
the PWC rate which petitioner paid between May
1957 and May of 1962 was not the rate set forth
the PWC tariffs; the attack is upon the PWC tar
rate and the claim is that the rate would have bee
lower but for the combined activities of FEC a
PWC.

ARGUMENT

I. The question presented, although important, was decided below in accordance with decisions of this Court and conformably to a decision of another circuit.

The importance of the question of supersession of the antitrust laws by the Shipping Act, 1916, as amended, to the extent of the commerce of the United States encompassed within the regulatory program of the Shipping Act, is demonstrated by the two instances in which this Court has granted certiorari in cases where the point was squarely involved. In *U.S. Navigation Co.* v. *Cunard Steamship Company, Ltd.,* 284 U.S. 474 (1932), and again in *Far East Conference* v. *United States,* 342 U.S. 570 (1952), this Court held that the Shipping Act had, *pro tanto,* superseded the antitrust laws, and that the exclusive primary jurisdiction over complaints charging unlawful anti-competitive activities by common carriers by water, or other persons subject to the Shipping Act, rests with the Federal Maritime Commission[2]. In both cases antitrust complaints were dismissed.

Although *Far East Conference* may have brought up to date the terminology in which the rationale was expressed, both decisions proceeded on the theories that the Shipping Act provided an "all-pervasive

[2] The Commission is the latest in a series of agencies which, since 1916, have been charged with the administration of the Shipping Act. See note following 46 U.S.C.A. §804, bound volume, and note following 46 U.S.C.A. §1111, bound volume and pocket supplement.

scheme" for the regulation of anti-competitive activities and competitive methods of ocean carriers; that the economics of ocean transportation is a special field of knowledge within the competence of the Commission, whose day-to-day function it is to apply the statute with the *expertise* acquired through familiarity with the subject matter; and that uniformity and consistency of regulatory policy can best be attained by unitary administration of the regulatory statute, and not by dual regulation under the differing and, in critical respects, antithetical standards of the Shipping Act and the antitrust laws.

As petitioner is at pains to point out, both *U.S. Navigation Co.* and *Far East Conference* were suits seeking injunctive relief. However, the supersession and primary jurisdiction doctrines of those cases were applied with full force and effect in a private suit, against a steamship conference for treble damages under the antitrust laws in *American Union Transport* v. *River Plate & Brazil Conferences*, 126 F. Supp. 91 (S.D.N.Y. 1954). The dismissal of the complaint was affirmed on the opinion below in *American Union Transport* v. *River Plate & Brazil Conferences*, 222 F. 2d 369 (2d Cir. 1955).

It thus appears that none of the reasons for the granting of the writ which are contemplated by Rule 19 of the Rules of this Court is present. As for petitioner's suggestion (Petition, p. 7) that the decision of the Court of Appeals calls for an exercise of this Court's power of supervision, the argument advanced borders on the frivolous. The only sense in which there are clear and undenied averments of the complaint is that a motion to dismiss for failure to state

a claim upon which relief may be granted—akin to the common law demurrer—admits, for the purposes of the motion only, the well-pleaded facts alleged in the complaint.

II. The decision below was correct in principle.

The Court of Appeals analyzed at length the all-embracing regulatory scheme of the Shipping Act (336 F. 2d at 657-664). Petitioner quibbles with the accuracy of some of the paraphrases of certain sections of the Shipping Act which appear in the opinion. However, for the present purpose, only two sections of the Shipping Act need attention. Section 15, 39 Stat. 733, as amended by 75 Stat. 763 (46 U.S.C. §814), directs every common carrier by water, or other person subject to the Act, to file immediately with the Commission a copy or memorandum of every agreement with another such carrier or person, "fixing or regulating transportation rates or fares; * * * controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The Commission is directed to disapprove by order, after notice and hearing, any agreement, "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act * * *." The Commission is directed to approve all other agreements. Specific criteria are provided for disapproval of conference agreements or inter-confer-

ence agreements which fail to contain provisions required by the statute. Any agreement not approved or disapproved by the Commission shall be unlawful, and agreements shall be lawful only when and so long as approved by the Commission. Before approval or after disapproval, it shall be unlawful to carry out an agreement. Whoever violates any provision of §15 shall be liable for a civil penalty of not more than $1,000.00 for each day such violation continues.

By asterisks we have indicated the omission above of a number of categories of restrictive agreements required by §15 to be filed with the Commission. We have set forth those categories which clearly encompass the concerted activities for the fixing and enhancement of ocean freight rates alleged in the complaint. Section 15 would seem to provide completely for the substantive regulation of the very kind of agreement which is the subject matter of this suit. It specifies clearly the statutory criteria for legality and illegality of that very kind of agreement.

Section 22 of the Shipping Act, 39 Stat. 736 (46 U.S.C. §821), authorizes "any person" to file with the Commission a complaint "setting forth any violation of this Act by a common carrier by water * * * and asking reparation for the injury, if any, caused thereby." After investigation and by order, the Commission "may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation." Thus, for the violation of the system of substantive law of carrier agreements created by §15, the Congress created a complete remedial provision in §22 of the Shipping

Act. Unlike some regulatory statutes (*e. g.*, §§9 and 22 of the Interstate Commerce Act, 24 Stat. 382, 387, as amended (49 U.S.C. §§9, 22)), neither §22 nor any other section of the Shipping Act provides for suits in court to recover damages for violations of the Act or for the saving of remedies at common law or under other statutes.

This combination of substantive and remedial law applicable to ocean transportation, together with the provision of §15 exempting §15 agreements from the antitrust laws, fulfills all of the requirements for supersession laid down in *U.S. Navigation Co.* v. *Cunard Steamship Company, Ltd.*, *supra*, and the cases under the Interstate Commerce Act on which that decision relied.

Petitioner has sought to sidestep *U.S. Navigation* and *Far East Conference* on the ground that they involved applications for injunctive relief, prospective in nature, whereas the present suit seeks damages for past conduct. This difference, petitioner claims, eliminates from the present case the threat of dual regulation which may be present where an injunction limiting future conduct is sought. We point out that, inconsistently, petitioner seeks to justify the allowance of the treble damage remedy on the ground that it has not only the purpose of restitution, but also a regulatory and punitive objective (Petition, pp. 14-17). There can be no question but that punitive damages imposed for a past course of conduct will inevitably have an impact upon the future conduct of the party held liable. Thus there is equal danger of dual incompatible regulation whether the remedy sought under the antitrust laws is injunctive or in the

nature of punitive damages. The integrity of the regulatory scheme under the Shipping Act can be maintained only if the consensual restraints on competition, covered in detail in §15 of the Shipping Act, are made to depend for their lawfulness or unlawfulness solely upon the standards erected in §15 of the Act, and not upon the irreconcilable standards of the antitrust laws.

As in the court below, petitioner seeks to make it appear that since *Far East Conference* was decided, this Court has issued decisions which have eroded the substance of its doctrine. To the extent that intervening decisions have, in some instances, held the supersession doctrine inapplicable, the cases may be distinguished on one or more of several grounds: (1) the regulatory statute involved in cases of private parties seeking reparation contained no authorization to the regulatory agency for the award of reparation or damages in any amount whatsoever; or (2) the regulatory statute did not completely cover substantively the conduct charged to be illegal under the antitrust laws; or (3) the regulatory statute clearly contemplated coequal jurisdiction of an administrative agency created by it and of the courts under the antitrust laws. None of the cases involved the Shipping Act, 1916.[3]

Petitioner argues here (Petition, pp. 25-29), as it did below, that under the doctrine of *Great Northern*

[3] *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958), did involve the Shipping Act, but did not involve supersession or exclusive primary jurisdiction. The proceeding originated with the Commission and found its way into court on review of a Commission order of approval under §15 of the Shipping Act.

Ry. Co. v. *Merchants Elevator Co.*, 259 U.S. 285 (1922), there is no call for the application of administrative *expertise* in the present case. Petitioner says that it is the ordinary business of courts to determine whether an agreement or conspiracy existed and, if so, whether it was encompassed within the approval of the Joint Agreement between Pacific Westbound Conference and Far East Conference. We point out that the Commission itself has been wrestling with these questions for some time and, in its Docket No. 872, "*Agreement No. 8200-Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference*", instituted on October 26th, 1959, the Examiner's Initial Decision of August 30th, 1963, 2 Pike & Fischer Ship. Reg. Rep. 900, has been the subject of exceptions and oral argument before the Commission and is pending final decision. The court below, in its *per curiam* opinion on petition for rehearing, so aptly described the questions appropriate for administrative determination that we merely refer to that opinion (336 F. 2d at 668).

Finally, here as in the court below, petitioner makes a point of what it conceives to be changes in the alignment of the positions of the majority and the minority of the Justices of this Court since *Far East Conference* (Petition, p. 38). The court below (336 F. 2d at 656-7 and n. 11), appropriately rebuffed this approach, which must rest on a philosophy that we have a government of men, not of laws.

We submit that this argument merits equally emphatic rejection by this Court. Whatever may be said in favor of flexibility of the law so that it may evolve

and adapt to social and economic change, cannot be said in favor of law which vacillates with the accidents of names and numbers. Stability, especially in commercial law, has an important and well-recognized social value.

Conclusion

For the foregoing reasons, it is respectfully submitted that the present petition for a writ of certiorari should be denied.

Respectfully submitted,

New York, N. Y.,
December 4th, 1964.

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In the Supreme Court of the United States

October Term, 1964

No. [redacted] 20

Carnation Company, a corporation,
Petitioner,
vs.
Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari

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In the Supreme Court of the United States

October Term, 1964

No. 657

Carnation Company, a corporation,
Petitioner,
vs.
Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari

I.

Pursuant to Supreme Court Rule 40(3), respondent Pacific Westbound Conference (PWC) omits matters adequately covered in sections I, II, and IV of the Petition and in the appendices thereto.

II.

STATEMENT OF THE CASE

Respondent PWC agrees that petitioner's statement of the case is in most respects correct. Respondent does take exception to important aspects of that statement, however, and accordingly offers the following statement of the case.

A. Proceeding Below

Petitioner (plaintiff below) commenced this action on December 5, 1963 by filing its complaint under the Antitrust Acts[1] in the United States District Court for the Northern District of California, Southern Division, against PWC and the Far East Conference (FEC) (R. 6-22).

On March 1, 1963 a motion was filed on behalf of the Pacific Westbound Conference, its Chairman, and its members individually, to dismiss the action on the ground that the District Court was without jurisdiction to proceed as the matter was and is subject to the exclusive primary jurisdiction of the Federal Maritime Commission (R. 28-31). A similar motion was filed on behalf of the Far East Conference, its members and former members (R. 23-27), and by the Federal Maritime Commission which additionally moved for leave to intervene in the proceeding (R. 32-35). All motions were supported by lengthy memoranda on points and authorities. By order of April 30, 1963, the Court granted the motion of the Federal Maritime Commission to intervene and requested further argument on the question of whether the Shipping Act, 1916[2] provides a

1. Jurisdiction of the District Court was alleged under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, Section 4 of the Clayton Act, 15 U.S.C. § 15, and Sections 1331, as amended, and 1337 of the Judicial Code, 28 U.S.C. §§ 1331, 1337).

2. 46 U.S.C. §§ 801, *et seq.*

remedy to appellant (R. 61-62). Supplemental memoranda were filed by all parties and on June 11, 1963, further argument was held.

On June 21, 1963, in a Memorandum of Opinion the District Court concluded that petitioner's complaint tendered the issue whether the defendant carriers (respondents) had carried out a rate agreement prior to approval by the Commission in violation of Section 15 of the Shipping Act, that the Act provides a remedy for any violation thereof, and that the Supreme Court has held that the antitrust laws are superseded to the extent that the Shipping Act provides a remedy, citing: "*United States Navigation Co. v. Cunard,* 284 U.S. 474 (1931); *Far East Conference v. United States,* 342 U.S. 570 (1951); See also *American Union Transport v. River Plate,* 126 F. Supp. 91 (S.D. N.Y., 1954), aff'd 222 F.2d 369 (2d Cir. 1955); *Rivoli v. New York,* 167 F. Supp. 940, 943 (S.D. N.Y., 1956); *United States v. Alaska S.S. Co.,* 110 F. Supp. 104 (W.D. Wash. 1952)." (R. 63-64)

Petitioner appealed to the Court of Appeals for the Ninth Circuit (R. 67). That Court affirmed the judgment below and denied a petition for rehearing (R. 92-120, 122-24).

B. Facts

We adopt that part of petitioner's statement (Petition pp. 10, 11) which says:

> "Carnation Company, was a shipper of evaporated milk from the Pacific Coast to the Philippine Islands by defendant common carriers, members of defendant Pacific Westbound Conference (PWC) (R. 9, 10, 21).
>
> Defendant common carriers to the Far East (R. 9, 10-13) fell into 3 groups, (1) those operating only from Pacific Coast ports (R. 10-11), (2) those operating only from the Atlantic Coast and/or Gulf of Mexico ports (R. 11), and (3) those operating both from Atlantic Coast and/or Gulf ports and from Pacific Coast ports

(R. 11-13). Those operating from Pacific Coast ports were the only carriers providing general cargo and regular berth service on substantially regular routes and with regular sailings and were the only carriers by whom the plaintiff could ship to Manila (R. 14, 21).

Before January 1953 the carriers from Pacific ports associated themselves under Pacific Westbound Conference Agreement No. 57 to form the Pacific Westbound Conference for the purpose, among other things, of fixing the rates at which Conference members would serve the trade. Agreement No. 57 provided *that PWC should fix the rates.* The Agreement was filed with, and approved by, the United States Shipping Board under Shipping Act, 1916, § 15 (46 U.S.C. § 814). Thereafter those rates were fixed by PWC, except as stated below. Only carriers operating from Pacific Coast ports were members of PWC (R. 13-14). No carrier operating only from Pacific Coast ports was a member of the Far East Conference (FEC) (R. 14).

Before January 1953 the carriers from the Atlantic and Gulf ports to the Far East formed the Far East Conference (FEC) for the purpose, among other things, of fixing rates to be charged by its members. Only carriers operating from Atlantic or Gulf ports were members of FEC. No carrier operating from only Atlantic and/or Gulf ports was a member of PWC (R. 14-15).

Carriers operating from Atlantic or Gulf ports and Pacific ports were members of both Conferences (R. 13-15).

Trade from the Atlantic and Gulf to the Far East was competitive with that from the Pacific Coast. PWC and FEC served different trades that were competitive and their services were competitive except as restrained as stated below (R. 15)" (emphasis as in original; ref. to Complaint converted to Record ref.)

The balance of petitioner's factual statement requires, in our view, different emphasis. In November 1952, mem-

rs of the Pacific Westbound Conference (PWC) and Far ast Conference (FEC) agreed in writing to "establish e rates to be charged for the transportation of commodi- es, and the rules and regulations governing the applica- on of said rates . . ." The rates were to be established by he parties" and not by the conferences separately (R. 48).

The agreement further provided for an "initial meeting" the parties to carry out the approved basic agreement. he initial meeting, it was provided, "shall make rules, not consistent with the provisions of this agreement, for the onduct of all meetings to be held hereunder, and for the ansaction of such other business as the parties may be ermitted to conduct by virtue hereof, including *the pro- ision of the machinery for the change of any rates, rules r regulations* adopted at the initial meeting or at any ubsequent meeting." (R. 48)

The agreement further provided for the right of inde- endent action by either party (R. 49).[3]

This joint agreement, known as Agreement 8200, was filed ith and approved by the Federal Maritime Board[4] (R. 47) nd thereby exempted specifically by statute from the oper- tion of the antitrust laws. (Shipping Act, 1916 § 15; 46 J.S.C. § 814)

The agreements described in petitioner's complaint were llegedly entered at the initial meeting in January, 1963 rovided for in Agreement 8200 (R. 16-17).

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3. This provision provides an escape valve by which conferences an proceed independently if there is no concurrence pursuant to he agreement and it is to the best interest of that conference to ct independently.

4. Now the Federal Maritime Commission; hereinafter, the Com- nission's predecessor agencies, including the Federal Maritime Board, the United States Maritime Commission, and the United States Shipping Board are referred to as the Federal Maritime Commission, or "the Commission."

In 1959 the Federal Maritime Commission instituted an investigation "to determine whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of said Section 15 and whether it is being carried out in a manner which makes it unjustly discriminatory or unfair." On September 8, 1960, petitioner was granted leave to intervene in that proceeding. That proceeding was designated Docket 872 (R. 40-41, see R. 38-56).[5]

As the Court of Appeals stated: "The issues presented at this hearing by Carnation and others included in general the same matters and claims set forth in Carnation's complaint in this case" (R. 95-96). Those "same matters and claims" were, as alleged by petitioner in its complaint:

1. Defendants [respondents] illegally conspired and agreed to restrain foreign commerce (R. 16).

2. Defendants illegally conspired and agreed to fix rates (R. 16).

3. Defendants illegally conspired and agreed not to disclose to any shipper information regarding rate changes and/or the position of either Conference or of any member of either Conference regarding rate requests (R. 16-17).

4. Defendants illegally conspired and agreed that PWC would pretend to set and apply rates which had been jointly agreed upon (R. 17).

5. Defendants illegally conspired and agreed that PWC would make no changes in rates agreed to without the concurrence of the FEC except rates on the PWC initiative list (R. 17).

6. Defendants illegally conspired and agreed to establish a "list of initiative items" which would permit the Conference with the initiative to set rates with-

5. The Order instituting Docket 872 as well as other information concerning it is contained in the Lisi Affidavit and attachments (R. 38-56). The proceeding is described in inadvertent error by petitioner as "certain proceedings before the Federal Trade [sic] Commission". (Petition, p. 10).

out the concurrence of the other Conference. The list of initiative items did not include evaporated milk until May 1961 (R. 17-18).

7. Defendants PWC and FEC illegally conspired and agreed that the rate for evaporated milk from Pacific Coast ports to the Philippine Islands should be increased by $2.50 per ton (R. 18-19).

8. Defendant PWC, "pretending to act agreeably to the provisions of said Agreement No. 57", illegally conspired and agreed to state and circulate the $2.50 increase (R. 19).

9. Defendant PWC pursuant to its alleged agreements with the FEC in fact announced, circulated and charged a rate for evaporated milk increased by $2.50 (R. 19).

10. Defendant PWC because of its alleged agreement with the FEC not to grant a reduction unless the FEC concurred, refused to grant a reduction of $2.50 per ton requested by Carnation in the rate for evaporated milk (R. 20).

III.

QUESTION PRESENTED AND SUMMARY OF POSITION

Petitioner's complaint in the District Court stated violations of the Shipping Act, 1916 (46 U.S.C. § 801 *et seq.*). The complaint also stated a claim for treble damages under the antitrust laws, absent the regulatory scheme pertaining to the shipping industry under the Shipping Act, 1916. The Court of Appeals affirmed the District Court's dismissal of the complaint on the doctrine of supersession and exclusive primary jurisdiction as enunciated in *United States Nav. Co. v. Cunard S.S. Co.,* 284 U.S. 474, 76 L.ed. 408 (1932) and *Far East Conference v. United States,* 342 U.S. 570, 96 L.ed. 576 (1952). The opinion of the Court of Appeals demonstrates that its decision was based on the ground that governed the *Cunard* and *Far East* cases,

namely, the Shipping Act, 1916 provides the exclusive remedy for the wrongs alleged in the complaint and the Federal Maritime Commission has the primary jurisdiction[6] to decide the matter.

The Petition in questioning the decision of the District Court and the Court of Appeals presents the question whether that principle becomes inapplicable if the complaint is for treble damages rather than for an injunction.[7]

None of the "special and important reasons" why the Court should grant certiorari which are suggested in Supreme Court Rule 19 exist here.

There is no contention in the Petition that the Court of Appeals decided this question in conflict with the decision of another Court of Appeals.[8] Since the Court of Appeals expressly followed the cases of *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 76 L.ed. 408 (1932) and *Far East Conference v. United States*, 342 U.S. 570, 96 L.ed. 576 (1952) and applied the ruling in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 9 L.ed. 2d 325 (1963) which are the three principal cases dealing with the issues involved, there can be no assertion that the Court of Appeals decided a federal question in conflict with applicable decisions of this Court. Rather, the thrust of the petition is to comb the facts of those decisions in search

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6. The term is somewhat misleading. Under the doctrine the Commission has exclusive original jurisdiction subject to appeal to the Courts.

7. Petitioner's statement of questions also raises the question of a right to trial by jury. Nowhere does the Petition discuss this issue. Indeed, it was settled as long ago as 1907 in *Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L.ed. 553 and *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 67 L.ed. 183 (1922).

8. Indeed, the instant case was decided exactly the same as a decision in the Second Circuit presenting identical questions. (*American Union Transp. v. River Plate & Brazil Conferences*, 222 F.2d 369 (2d Cir. 1955) affirming on opinion below in 126 F. Supp. 91 (S.D.N.Y. 1954).

of possible distinctions between the ruling cases and the case at bar. These minute distinctions are thereafter presented as if they constituted important questions of federal law that have not been but should be decided by this Court. There are, however, no new or important issues presented by the instant case. The question has been thoroughly considered and carefully answered by the Court on numerous occasions and particularly in the three cases cited above.

The *Cunard* and *Far East* cases held that a complaint seeking an injunction under the Sherman Act against an agreement allegedly unfiled under Section 15 of the Shipping Act (46 U.S.C. § 814) should be dismissed because "the Shipping Act covers the dominant facts alleged in the present case as constituting a violation of the Anti-trust Act"[9] and "the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws".[10] Petitioner seeks to distinguish these cases on the ground that the instant action sought treble damages rather than an injunction and that accordingly 1) *Cunard* and *Far East* involved prospective relief rather than relief looking to past acts, and 2) *Cunard* and *Far East* are inapplicable because the Shipping Act does not grant remedies yielding a dollar recovery equal to a treble damage recovery while administrative powers are deemed equivalent to an injunctive remedy.

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9. *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 483; 76 L.ed. 408, 413 (1932). A similar holding as regards unapproved practices under the Federal Aviation Act may be found in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 9 L.ed. 2d 325 (1963).

10. *Ibid* at 485, 76 L.ed. at 414, quoted as governing principle in *Far East Conference v. United States*, 342 U.S. 570, 574, 96 L.ed. 576, 582 (1952).

Respondents reply that a suit for treble damages under the antitrust laws falls squarely within the rule of *Cunard* and *Far East*; that holdings of the Supreme Court and lower courts in other cases make this clear; that the Shipping Act provides penalties and remedies comparable to a treble damage recovery; and that the policy of the statutes in question and of the primary jurisdiction doctrine require the result reached by the District Court and the Court of Appeals.

Petitioner further asserts that the doctrine of primary jurisdiction is inapplicable because there are no questions for the administrative agency to decide. Respondents point out to the contrary that the administrative agency must decide such matters as: (1) whether the alleged agreements were in fact made, (2) to what extent may parties implement an approved agreement without requiring further agency approval, (3) whether or not the alleged agreements fall within the scope of an already approved agreement filed with the Commission, (4) whether the Shipping Act, 1916 was otherwise violated, (5) assuming the agreement violated the Act because unfiled and unapproved, should the Commission now approve the agreement as it stands or as modified, and (6) assuming a violation, the extent of reparations, if any, to be awarded.

IV.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

The purpose of the doctrine of exclusive primary jurisdiction is to accommodate conflicting statutory schemes: here the proscription of limitations on competition contained in the antitrust laws and the encouragement of such limitations under governmental supervision pursuant to the Shipping Act, 1916.[11] The doctrine

11. 46 U.S.C. § 801 *et seq.* Citations to the Shipping Act, 1916 herein are to the Act as it stood at the time the matters giving rise

"is designed . . . to assure that the substantive exemptions from the antitrust laws created by Congress or required by the logic and structure of the regulatory scheme are not destroyed through by-passing the forum chiefly concerned with the regulation of the industry in question." (von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 932 (1954)).

A. The Cunard and Far East Cases Hold That the Antitrust Laws Are Inapplicable to Agreements Subject to Section 15 of the Shipping Act.

As the Court of Appeals stated, the agreements alleged in the instant treble damage complaint as violations of the antitrust laws were also agreements subject to Section 15 of the Shipping Act.[12] This section requires that such agree-

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to the complaint allegedly transpired. The amendments by P.L. 87-346, Oct. 3, 1961 are omitted.

12. R. 95-96. Section 15 reads:

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to

ments be filed with and approved by the Federal Maritime Commission. If approved, they are expressly exempted from the antitrust laws. If unapproved or unfiled the parties thereto are subjected to specific penalties, and injured persons are entitled, under Section 22 of the Shipping Act (46 U.S.C. § 821), to reparations for losses suffered.

The *Cunard* and *Far East* cases hold that there can be no injunctive relief under the antitrust laws against agreements subject to Section 15 of the Shipping Act and allegedly unfiled under that section because the remedies of the Act supersede the antitrust laws. (*United States Nav. Co. v. Cunard S.S. Co.,* 284 U.S. 474, 485-86, 76 L.ed. 408, 414-15 (1932) followed in *Far East Conference v. United States,* 342 U.S. 570, 573-74, 96 L.ed. 576, 581-82 (1952)). The Court has never questioned the holdings of these cases[13] and as recently as 1963 the Court reaffirmed their

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the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

13. Petitioner has contended throughout this case that *Federal Maritime Bd. v. Isbrandtsen Co.,* 356 U.S. 481, 2 L.ed. 2d 926 (1958) in some way limits the holdings of the *Cunard* and *Far East* cases. (See *e.g.* Petition pp. 34-36, 39). The Court in

principle and cited them in its support. (*Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 313 n. 19, 9 L.ed. 2d 325, 337 (1963)).

The reasoning in these cases had no special relevance to the fact that the antitrust remedy sought was an injunction. Supreme Court cases decided both before and after *Cunard* and holdings by the lower federal courts compel the conclusion that there is no distinction between injunctive and treble damage relief for purposes of either the supersession of remedies doctrine or primary jurisdiction.[14] Because petitioner so vigorously urges this as a distinction, however, and because it is the only ground on which *Cunard* and *Far East* at all differ from this case, we feel it is important to discuss the matter in detail.

The Court in *Keogh v. Chicago & N.W. Ry.,* (260 U.S. 156, 67 L.ed. 183 (1922)), concluded that the remedy for injury resulting from unreasonably high rail rates set by

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Isbrandtsen held that dual rate contracts similar to those involved in *Far East* and *Cunard* violated Section 14 Third of the Shipping Act (46 U.S.C. § 812) and hence could not be approved under Section 15. There was no suggestion in *Isbrandtsen* that the antitrust laws were applicable to this Shipping Act question, and the Court discussed the *Far East* case solely on the question of legality under Section 14 Third of dual rate contract systems. As the Court of Appeals in the instant case stated regarding petitioner's *Isbrandtsen* argument, "We think that appellants' effort to assert the lack of continuing authority of Cunard and Far East is entirely fallacious and altogether unsupportable." (R. 103). The Court then supports this statement in footnote 12 which gives a clear explanation of petitioner's argument and the reasons why it is "entirely fallacious."

14. Unless it be that supersession is *less* likely to be found if the prayer is for an injunction. In *Georgia v. Pennsylvania R.R.,* 324 U.S. 439, 89 L.ed. 1051 (1945) the Supreme Court held that an alleged rail rate conspiracy could be enjoined but affirmed dismissal of the treble damage complaint. The author of that opinion has stated that it would probably be decided differently as to the injunctive aspect of the complaint under present laws. (See *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 306 n. 11; 9 L.ed. 325, 333 (1963)).

an alleged illegal conspiracy is that contained in the Interstate Commerce Act rather than a damage action under the antitrust laws. The Court stressed the need to maintain a uniform rate structure and equality of treatment of different shippers.[15]

Thus, when the *Cunard* case was brought some years later, it was already established that administrative remedies prevailed as to damage actions. The complaint in *Cunard* sought only an injunction which was not, strictly speaking, a remedy that the administrative agency could grant. Nonetheless, the Shipping Act remedy was deemed exclusive.

The later cases of *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500, 80 L.ed. 827 (1936) and *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 89 L.ed. 1051 (1945) further stress that treble damage actions may not be brought where the administrative scheme provides a remedy. The *Terminal Warehouse* case specifically states that this principle is applicable to the Shipping Act, citing the *Cunard* case (297 U.S. at 514-15, 80 L.ed. at 835-36):

> "Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or *water*. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce

15. The *Keogh* case, a treble damage action, was cited in the 1963 *Pan American* decision, (371 U.S. at 310, 9 L.ed. 2d at 335-36) for the proposition that a regulatory scheme "leaves . . . all questions of *injunctive* relief against" certain anti-competitive practices to the administrative body. Thus, the Supreme Court indicated that treble damage actions present identical questions of supersession.

Act *like the Shipping Act embodies a remedial system that is complete and self-contained.* It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive. If another remedy is sought under cover of another statute, there must be a showing of another wrong, not canceled or redressed by the recovery of damages for the wrong explicitly denounced. The opinions of this court in their fair and natural extension point to that conclusion."

The lower federal courts have held that the rule of the *Cunard* and *Far East* cases applies to treble damage actions. *American Union Transp. v. River Plate & Brazil Conferences*, 126 F. Supp. 91 (S.D. N.Y. 1954), *aff'd* on opinion below, 222 F.2d 369 (2d Cir. 1955) is precisely in point. A treble damage action alleging a conspiracy by carrier members of a steamship conference was dismissed on the ground that the allegation of an agreement unfiled with and unapproved by the Federal Maritime Board constituted a Shipping Act question for the regulatory agency. The same attempt to distinguish *Cunard* and *Far East* on the basis that they involved injunctive actions was rejected, the Court holding that those cases compelled the dismissal.[16]

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16. In reliance upon *Cunard* the District Court said:
"Therefore, assuming the illegality of the procedure of effectuating an unfiled and unapproved agreement, it remains for the board to determine the substantive questions raised by the agreement under the Shipping Act, and the remedy of the complaining party for substantive violations remains under the Shipping Act. The language of the Supreme Court

A number of other cases in following the Supreme Court reach the same result.[17]

Cunard and *Far East* also dispose of the contention that since only approved agreements are expressly exempted by Section 15, unapproved agreements are not. Since petitioner persists in this position (Petition pp. 22-24) it is well to emphasize the reasons why it has been rejected by the Court. Even a superficial reading of Section 15 discloses that Congress provided two distinct functions under that provision: (1) Approval of agreements falling within the first paragraph of Section 15 and (2) Policing and penalties for those who carry out such agreements before approval or after disapproval. Thus, the second paragraph of Section 15 gives the Commission power to "disapprove, cancel, or modify any agreement . . . *whether or not previously approved by it;*" the fourth paragraph provides that "before approval, or after disapproval, *it shall be unlawful to carry out*" any agreement; and the final paragraph subjects the parties who violate the prohibitions of the fourth paragraph to a penalty of $1000 *per day.*

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in the United States Navigation case precludes the consideration of the factual distinction urged by the plaintiff."

Referring to *Far East,* the court concluded:

"the clear language of the Supreme Court authoritatively compels the decision." (126 F. Supp. at 93).

The Second Circuit (Clark, Medina and Dimock, J.J.) was so satisfied with the District Court's view of the holding of *Cunard* and *Far East* that it unanimously "Affirmed on the opinion of District Judge Edelstein. . . ." (222 F.2d at 370).

17. *Rivoli Trucking Corp. v. New York Shipping Ass'n.,* 167 F. Supp. 940 (S.D. N.Y. 1956); *Rivoli Trucking Corp. v. New York Shipping Ass'n.,* 167 F. Supp. 943 (S.D. N.Y. 1957); *United States v. Alaska S.S. Co.,* 110 F. Supp. 104 (W.D. Wash. 1952). See *Swayne & Hoyt v. Kerr Gifford & Co.,* 14 F. Supp. 805 (E.D. La., 1935); *Wisconsin & Mich. Transp. Co. v. Pere Marquette L.S.,* 67 F.2d 937 (7th Cir. 1933); *United States v. Borax Consolidated Ltd.,* 141 F. Supp. 396 (N.D. Cal. 1955).

If it were intended that Section 15 agreements be exempted from the antitrust acts only if approved, the enforcement provisions of Section 15 would be meaningless. There would have been no necessity to include a provision in Section 15 making the carrying out of unapproved agreements unlawful. If approval were not sought and obtained under the Shipping Act, the penalties and remedies already provided by Congress under the antitrust acts for the unapproved and, hence, illegal agreement would pertain.

The fact that the Act does contain penalty provisions relating to unapproved agreements demonstrates that Congress did not desire to treat the matter piecemeal leaving the function of approval to the Commission but dealing with the enforcement problem either administratively *or* under the antitrust acts depending on whether the Commission or a private litigant were the more fleet of foot. Since by the time the Shipping Act was passed the doctrine of primary jurisdiction and supersession of remedies was firmly established,[18] it was not necessary for Congress to provide express exemption from the then existing antitrust acts for acting under unapproved Section 15-type agreements.

By contrast it *was* necessary to include an exemption *after* approval because once the agreement is approved, it no longer constitutes a violation of the Shipping Act and there is, accordingly, no penalty or remedy provided which would supersede the penalties or remedies of the antitrust acts. There would be a conflict between the approved agreement which is not in violation of the Shipping Act and the antitrust laws of which it would still constitute a violation. As a consequence, in order to avoid the very problem of

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18. See *e.g.*, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L.ed. 553 (1907) and cases cited in von Mehren, *supra*, p. 11 at 935, nn. 23 and 27.

accommodation which petitioner raises, it was necessary to include the specific exemption for approved agreements.

B. Congress Subjected Persons Violating the Shipping Act to the Act's Sanctions, Not to Parallel Treble Damage Actions.

Petitioner correctly characterizes the treble damage remedy under the antitrust laws as including both compensatory and punitive elements. The compensatory one-third is designed to make the plaintiff whole while the punitive two-thirds is designed to discourage violations of the law by defendant and to encourage plaintiffs to bring such actions.[19] The penalties and remedies provided in place of such recovery by the Shipping Act follow a very similar pattern.

The private remedy provisions of the Shipping Act offer strong evidence of Congressional intention to supersede the application of antitrust remedies with respect to matters covered by the Act. Violation of Section 15 of the Shipping Act by reason of the carrying out of an unfiled and unapproved Section 15-type agreement gives an injured party a right to reparations under Section 22 to the extent that he can prove damages. This is so even though the Commission would have approved the agreement had it been filed.[20] Petitioner, while alleging violation of Section 15 of

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19. See Petition, p. 15. Notably, the punitive two-thirds of such a recovery is taxable as ordinary income rather than as a tax-free return of capital (*Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 99 L.ed. 483 (1955)).

20. See *American Union Transp., Inc. v. River Plate & Brazil Conferences*, 5 F.M.B. 216 (1957) *aff'd sub nom.; American Union Transp. v. United States*, 257 F.2d 607 (D.C. Cir. 1958); *Swift & Co. v. Gulf & So. Atl. Havana Conference*, 6 F.M.B. 215; *rev'd sub nom.; Swift & Co. v. Federal Maritime Comm'n.*, 306 F.2d 277 (D.C. Cir. 1962), see 7 F.M.C. 431 (1962) (Settlement agreement on reparations); *Kempner v. Federal Maritime Comm'n*, 313 F.2d 582 (D.C. Cir. 1963). If the Commission orders reparations, the order may be enforced in a District Court and attorneys' fees and costs recovered (Shipping Act, 1916, § 30, 46 U.S.C. § 829).

the Shipping Act (R. 16-18), for reasons known to it determined not to pursue its administrative remedy, but to seek treble damages under the antitrust acts. (See Petition, p. 19, n. 30).

As stated by Judge Augustus Hand for the Second Circuit in the *Cunard* case:

> "It is difficult to suppose that Congress ever intended to give private parties two sets of remedies, under each of which reparation as well as other relief might be had, and still harder to imagine that these remedies might be pursued pari passu.
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> * * *
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> "No doubt, if the allegations in the amended bill are found to be correct, the Anti-Trust Acts have been violated, but the Shipping Act has been violated as well. Though the remedies under the Anti-Trust Acts are thought by plaintiff's counsel to apply, it does not follow that they do, where the frame of the Shipping Act indicates another procedure. We find that all the wrongs alleged are violations of the Shipping Act, and hold that the plaintiff must seek its remedy thereunder." (*United States Nav. Co. v. Cunard S.S. Co.*, 50 F.2d 83, 90 (2d Cir. 1931).

Petitioner's assertion that it is entitled to seek treble damages unless an *equal* amount would be recoverable under the Shipping Act assumes that antitrust remedies are only superseded if exactly equivalent remedies are provided. Although the Shipping Act penalties and reparations are roughly comparable to the punitive and remedial portions of antitrust recoveries, petitioner's assertion is incorrect. Supersession of the antitrust laws by another statutory scheme does not operate only if it secures the remedy most financially favorable to plaintiffs; nor is an antitrust treble damage remedy a constitutional right which cannot be taken

away by a different statutory provision. Supersession merely reconciles conflicting statutory patterns such as the Shipping Act and the antitrust laws, by giving effect to Congressional intent under the regulatory statute.

Under Section 15 of the Shipping Act, Congress amply provided the deterrent and took care of the punitive factor by setting the severe penalty of $1,000 per day for each day of violation. Further, Congress provided that punitive aspects of Shipping Act sanctions should be penalties payable to the United States rather than to the injured party under the Act. Reparations under Section 22 were to be handled administratively,[21] doubtless to insure that all shippers would obtain like reparations without discrimination and would not obtain what, in effect, would be rebates in the form of punitive damages. The heart of the Shipping Act is prevention of discrimination and preference between shippers similarly situated. Treble damage recoveries would upset this basic regulatory purpose and disturb uniformity by offering through the vagaries of jury verdicts the opportunity for windfalls to some shippers and no recovery or less recovery to others. The Court of Appeals astutely analyzed the situation when it stated:

> "To permit the maintenance of an action such as this would in our view produce for the shipping industry confusion worse confounded, destroy uniformity of interpretation and enforcement of the Shipping Act, and bring about the very type of discrimination which that Act was designed to avoid. We may assume that Carnation is not the only shipper who dislikes the rates fixed for shipment of its product. Carnation might win its suit and another similar concern, making a similar claim, might lose." (R. 111).

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21. The Shipping Act, unlike the Interstate Commerce Act, contains no saving clause preserving other remedies. (See Interstate Commerce Act § 22, 49 U.S.C. § 22).

This points up the converse of petitioner's persistent argument that while supersession and primary jurisdiction may be applicable to injunctive proceedings (as in the *Cunard* and *Far East* cases) they are not to damages for past actions. An injunction would in fact be less disruptive than to allow a treble damage suit because an injunction would but nullify the carriers' agreement *in futuro* enabling them to make a new agreement that did satisfy the Shipping Act whereas, as stated above, award of treble damages would create discrimination as to past acts.

C. The Wrongs Charged in Petitioner's Complaint as Antitrust Violations Are Precise Ingredients of the Federal Maritime Commission's Authority Under the Shipping Act.

Cunard particularly emphasized the following test for granting a motion to dismiss on grounds that a complaint charges violation of a regulatory statute:

> "*A comparison of the enumeration of wrongs charged in the bill with the provisions* of the sections *of the Shipping Act* above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws." (*United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 485, 76 L.ed. 408, 414).

This test was followed in *Far East Conference v. United States*, 342 U.S. 570, 574; 96 L.ed. 576, 582 (1952).[22]

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22. The *Far East* and *Cunard* cases applied this principle despite the fact that: (1) It was apparent that the agreements alleged had not been filed and approved; (2) The agreements, the Supreme Court later held, could not be approved by the Commission. (*Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 2

More recently, the Court has paraphrased the test in *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 305, 9 L.ed. 2d 325, 333 (1963) as follows:

> "The acts charged in this civil suit as anti-trust violations are *precise ingredients* of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers."[23]

The wrongs that petitioner charges in its complaint may be summarized:

(1) An agreement to restrain foreign commerce (R. 16).

(2) An agreement to fix rates (R. 16).

L.ed. 2d 926 (1958)). Thus, the instant facts present an even clearer case than did *Cunard* and *Far East*. The *Pan American* case extended the rule to cover even the situation in which the administrative agency did not believe it had power over the agreements alleged in the antitrust complaint and had requested the Attorney General to bring the complaint. Notably also, the District Court in the *Pan American* case refused to dismiss the antitrust complaint and found a violation of the antitrust laws. In the instant case, there is a strong question whether the alleged Agreement need be filed or whether it was already covered by Agreement 8200. There is no question that it may properly be approved by the Commission. The administrative agency intervened in the antitrust action to support the motion to dismiss, and the District Court, after lenthy argument and memoranda were considered, granted the motion.

23. By contrast, the nature of administrative authority was far more limited in cases holding there should be no primary jurisdiction in the administrative agency. In *California v. Federal Power Comm'n,* 369 U.S. 482, 8 L.ed. 2d 54 (1962) the Commission's authority was limited to a finding of public convenience and necessity; it was not specifically concerned with the subject matter of the antitrust laws.

In *United States v. Radio Corp. of America,* 358 U.S. 334, 3 L.ed. 2d 354 (1959) the administrative authority was similiar. The Court contrasted the limited regulatory scheme and absence of administratively supervised rate structures with the shipping industry, citing the *Cunard* and *Far East* cases (358 U.S. at 347, 3 L.ed. 2d at 363).

In *Silver v. New York Stock Exchange,* 373 U.S. 341, 358-59, 10 L.ed. 2d 389, 401 (1963) the Court noted: "By providing no

(3) An agreement not to disclose to shippers information regarding rate changes or rate requests (R. 16-17).

(4) An agreement that respondent PWC would pretend to set rates itself that had been jointly agreed upon (R. 17).

(5) An agreement that PWC would make no rate changes without concurrence of FEC (R. 17).

(6) An agreement to establish a "list of initiative items" permitting the Conference with the initiative to set rates without the concurrence of the other conference. The list did not include evaporated milk until May, 1961 (R. 17-18).

(7) An agreement that the rate on evaporated milk from the Pacific Coast to the Philippines would be increased by $2.50 per ton (R. 18-19).

(8) An agreement that respondent PWC "pretending to act agreeably to the provisions of said Agreement No. 57" would state and circulate the $2.50 increase (R. 19).

(9) That respondent PWC in fact so announced, circulated, and charged this rate as agreed (R. 19).

(10) Respondent PWC acting pursuant to its agreement with FEC refused to grant a reduction of $2.50 per ton requested by Carnation in the rate for evaporated milk (R. 20).

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agency check on exchange behavior in particular cases, Congress left the regulatory scheme subject to 'the influences of . . . [improper collective action] over which the Commission has no authority . . .' "

In *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 351-53, 10 L.ed. 2d 915, 937-39 (1963), administrative powers under the Bank Merger Act did not extend to matters covered by the antitrust laws. The Court contrasted the *Pan American* case and the *Far East* case as areas in which the primary jurisdiction doctrine properly applied.

Whether these agreements in fact exist, their meaning, their coverage by agreements already on file with the Commission, their legality under various provisions of the Shipping Act, whether they should be approved or modified, and the consequences of any interim failure to comply with the Act are all Shipping Act questions within the responsibility of the Commission; all are "precise ingredients" of the Commission's authority. The Commission has full powers to consider them and to apply the Shipping Act to them. If the agreements alleged exist and also violate the standards set up by Congress the Commission has full power to take appropriate action with respect to the violation. Accordingly, under the tests of *Cunard, Far East* and *Pan American*, the antitrust laws are superseded with respect to the agreements alleged. The nature of the remedy pleaded in an antitrust complaint cannot defeat this principle laid down by the Court.

D. The Complaint Raises Issues Requiring Prior Resort to a Specialized and Expert Administrative Agency.

In the *Far East* case, the Court carefully elaborated the primary jurisdiction doctrine, which it characterized as "firmly established":

> ". . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circum-

stances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

(*Far East Conference v. United States,* 342 U.S. 570, 574-75; 95 L. ed. 576, 582 (1952).

In affirming dismissal of an antitrust complaint that also alleged the carrying out of an unapproved Section 15 agreement in violation of the Shipping Act, the Court concluded that "initial submission to the Federal Maritime Board is required" (*Ibid* at 576; 96 L. ed. 583).[24]

Petitioner asserts that this rule is inapplicable because "the only possible questions are of law" and "there is no action which the Commission could take which would give it [the conduct alleged] legality" (Petition, p. 36). The *Far East* and *Cunard* cases themselves reject petitioner's assertion. Those cases involved an agreement to establish a dual rate system under which shippers binding themselves to use only conference vessels paid lower rates than other shippers. One is hard put to find purely factual questions in these cases, though there are Shipping Act questions of policy and law. The Court held that the Commission must first decide the Shipping Act questions. *Federal Maritime Bd. v. Isbrandtsen Co.* (356 U.S. 481 at 497-98, 2 L. ed. 2d 926 at 937-38 (1958)) emphasizes that this is the holding of those cases.

The several agreements charged in petitioner's complaint pose factual and Shipping Act policy questions that are

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24. The *Far East* and *Cunard* cases, among others, have already determined that the Federal Maritime Commission is, as the Court of Appeals characterized it: a body specializing in and thoroughly familiar with ocean transportation, rates, agreements, practices, and shipping conditions (R. 101, 109-10, 115, 118). The Court there found these considerations particularly pertinent to the very questions presented in the instant case (R. 115, 118).

more complex and extensive than those in *Cunard* and *Far East*. Accordingly, their consideration by the Commission is even more imperative than was that consideration in *Cunard* and *Far East*. Furthermore, as in those cases, if the Commission should determine that the alleged agreements here need not be filed under Section 15 because already covered by Commission approved Agreements Nos. 57 and 8200, the agreements are specifically exempted by Section 15 from the antitrust laws, and no penalties would attach under the Shipping Act. This then clearly is "action the Commission could take which would give . . . legality" to charges made in the complaint.

But the basic question whether the alleged agreements fall within the scope of Agreements 57 and 8200 is not the only one that the Commission must decide. It is for the Commission to determine: (1) Whether the alleged agreements were in fact made. (2) What were the specific contents of those agreements if they were made? (3) Whether, if not included within Agreements 57 and 8200 the alleged agreements should be approved, with or without modification. (4) Whether, if not included within Agreements 57 and 8200, the alleged agreements violated other provisions of the Act than the filing requirements of Section 15. (5) The extent of reparations, if any, to award to persons injured by any violation found.

The principal Shipping Act question posed by the several agreements charged in petitioner's complaint is one that the Commission has pondered and interpreted since the early days of its existence. The complaint alleges that after approval of Agreement 8200 the parties held a meeting at which ten or more alleged agreements regarding procedures for fixing rates were made. These allegedly were outside of the approved agreement (R. 16-18).

But Agreement 8200 as approved by the Commission expressly calls for an "initial meeting" at which such rules shall be made including "the provision of the machinery for the change of any rates, rules and regulations." Are the procedures allegedly adopted at the "Santa Barbara meeting" authorized by Agreement 8200? To what extent may parties to an approved agreement adopt procedures implementing the approved agreement without further approval? Regarding unfiled agreements questionably subject to filing, how severely should a carrier be treated if it is later determined that an agreement should have been, but was not, filed? These knotty problems are central to the entire scheme of regulation of the shipping industry and are the first concern of the Commission which must enforce the Shipping Act.[25]

Standards regarding the extent to which a basic agreement covers subsidiary or routine matters or implementing agreements must be uniform for the whole industry and not vary with every case, as would result if antitrust suits bringing particular agreements into question were entertained. This uniformity is best obtained by submitting the question to the Commission. This was the result reached by the Court of Appeals and the District Court in the instant case and required by the Supreme Court in the *Cunard* and *Far East* cases.

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25. By way of example, the statute states that *every* agreement must be filed. But the Commission with its expertise recognized that a too liberal interpretation of the word "every" would deluge the Commission with routine matters merely implementing basic agreements. In *Section 15 Inquiry,* 1 U.S.S.B. 121 (1927) the Commission determined that "routine" matters carrying out a basic agreement need not be filed. What is or is not a routine agreement or amendment to an agreement has proven to be a most taxing question, requiring the expertise of persons thoroughly familiar with the industry.

Other questions requiring the need for uniform treatment are here involved. The complaint charged an agreement not to disclose to shippers how Conference members voted on rate requests at meetings (R. 16-17). Significantly, the question of disclosure of the voting on such Conference matters is currently the subject of a proposed rule being considered by the Commission, although the proposed rule, for excellent reasons, does not go so far as to require disclosure of the votes of individual carriers.[26] Manifestly, this question is one for the agency regulating the industry and not one for a court dealing primarily with the antitrust aspect of the matter.

The charge that Conference members agreed that no changes in rates would be made without concurrence of both Conferences (R. 17) raises, as the Court of Appeals recognized (R. 115), the question whether this alleged agreement falls within the approved provision in Agreement 8200 which states that the parties "shall establish the rates to be charged . . . from time to time, and the rules and regulations governing the application of said rates" and they shall take certain action only by concurrence of the two Conferences. (See R. 48-49). This is a question for the Commission in the first instance. Similarly, the charge in the complaint that the Pacific Westbound Conference agreed to pretend falsely to act under Agreement 57, its basic agreement, in announcing rates, presents a question initially for the Commission.

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26. Docket 1194—(The Proposed Rules are set forth in the Federal Register of August 6, 1964, p. 11384). As the Court of Appeals pointed out (R. 115) such disclosure would be "likely to result in the shippers granting their preferences in shipments to carriers who voted for rate reduction." This, in turn, would place intense pressures on the delicately balanced rate pattern in the industry and likely result in preferential treatment of powerful shippers despite the proscriptions of the Act.

As the Court of Appeals properly found with respect to these and other charges in the complaint: "these matters presented questions of fact and policy properly for the specialized competence of the Commission" (R. 118). The court, therefore, affirmed the dismissal of the complaint under the authority of the *Cunard* and *Far East* cases.

The fact is the Commission is currently considering the precise issues of fact, policy and law under the Shipping Act that are pleaded in the complaint. Before petitioner brought the complaint in the instant case the Commission initiated an investigation into Agreement 8200 to determine whether it was a true and complete memorandum of the agreement between the parties to it. As the Court of Appeals pointed out: "The issues presented at this hearing by Carnation [petitioner] and others included in general the same matters and claims set forth in Carnation's complaint in this case" (R. 95-96). Petitioner participated in the administrative hearing but chose to bring suit for treble damages under the antitrust laws although it could have sought reparations under the Shipping Act (Petition, p. 19, n. 30).

The Commission at the time petitioner's complaint was dismissed had not and still has not finally determined whether all or any of the agreements alleged fell within the scope of approved Agreements 57 and 8200. In an Initial Decision in the investigatory proceeding, however, the Examiner concluded (contrary to the complaint's charge that agreement of the two Conferences to concur on rates was outside the scope of the approved agreements) that the agreement to concur *is* authorized by Agreement 8200. The Examiner found other agreements to be outside the scope of Agreement 8200, but recommended that these be approved with modifications (see Agreement No. 8200, Docket 872, 2 Shipping Regulation Reports (Pike & Fischer)

900 (1963); the Examiner's opinion was issued in mimeographed form by the Commission. Aug. 30, 1963).

Should any or all of the alleged agreements be found by the Commission (1) not to have been made, or (2) made but included within the scope of approved Agreements 57 or 8200, it would be anomalous that a court could have imposed treble damages in the meantime (see *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 309, 9 L. ed. 2d 325, 335 (1963)). Even more serious, a true collision of regimes would occur in that a court by deciding both the existence of the alleged agreements and their coverage under Agreements 57 and 8200 would have determined the very Shipping Act questions that the Commission is charged with enforcing.

E. The Pervasive Regulatory Scheme of the Shipping Act Is Inconsistent With Allowance of Any Antitrust Actions.

With the possible exception of the Interstate Commerce Act, we are satisfied there is no regulatory statute that is fully comparable to the Shipping Act in its provision for supervised agreement on rates, in its provision for policing unfair competitive practices, in its sanctions for violation of substantive provisions, and in its provision for relief to those injured by violation of the Act. The Circuit Court's summary of Shipping Act regulations, as the decision itself observes, "discloses the extremely broad range of regulatory powers" (R. 104). The provisions of the Act and particularly Section 15, which is the cornerstone of the regulatory scheme, confirm the comprehensive or pervasive nature of the Act noted by the Court in the *Cunard* case.[27]

27. "The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." (284 U.S. at 480, 76 L.ed. at 412).

The Shipping Act represents the decision of Congress that maintenance of stable rate patterns in the shipping industry by intercarrier agreement and subject to governmental supervision and control was in the national interest and that application of the antitrust laws to the industry would injure that interest (*Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 489-90, 2 L.ed. 2d 926, 933 (1958)). Accordingly, Congress created an entire regime based on economic and regulatory postulates inconsistent with the antitrust laws. The Shipping Act provides its own standards of economic behavior and its own penalties and remedies upon violation of those standards.

Upon finding such a regulatory scheme, the Court has consistently applied the doctrine of primary jurisdiction to protect the integrity of the regulatory scheme without regard to whether the antitrust remedy asserted is for damages or for injunctive relief. (See *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 67 L.ed. 183 (1922) (treble damage action superseded by remedies of Interstate Commerce Act); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 9 L.ed. 2d 325 (1963) (injunctive relief superseded by Federal Aviation Act); *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 76 L.ed. 408 (1932) (injunctive relief superseded by Shipping Act remedies)). Decisions in which the doctrine of primary jurisdiction is found inapplicable have involved industries having regulatory schemes of limited scope. (*E.g., California v. Federal Power Comm'n*, 369 U.S. 482, 8 L.ed. 2d 54 (1962); *United States v. Radio Corp. of America*, 358 U.S. 334, 3 L.ed. 2d 354 (1959)).[28] In such cases there is no danger, as here, of a collision of statutory regimes founded on inconsistent principles. There is, correspondingly, no danger of defeat-

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28. See n. 23 *supra*, where these cases are discussed.

ing Congressional purposes such as there is in the instant case where Congress created a Commission with full regulatory powers over the industry.

F. Dismissal Is the Only Proper Course Here.

The Court of Appeals while properly concluding that dismissal is the right course evinced some lingering doubt whether the District Court should retain jurisdiction of the case pending action by the Commission. Petitioner while never advocating such a solution hints at its possibility (Petition, pp. 25 and 37). There may be situations where that is the appropriate course, as where doubt exists that the complaint states a cause cognizable by the agency under its regulatory statute and the agency is given the opportunity in the first instance to determine its jurisdiction. But this case is one where dismissal is the only proper course.

It is unquestioned that the complaint charges matters which are *all* within the Shipping Act. The Shipping Act provides a remedy for the wrongs charged. That remedy has superseded the judicial remedy under the antitrust acts. If given the opportunity, the Commission can deal fully with each issue and claim. There is not one thing left over that could come back to a district court for disposition. The Commission's decision is, of course, fully reviewable by the courts of appeal under the Hobbs Act (5 U.S.C. §§ 1031-1042). In such a review the full record before the Commission is before the Court of Appeals (5 U.S.C. § 1037).

Hence, the *primary* or original jurisdiction is in the Commission with full opportunity for court review. Dismissal is the correct action. A recent statement on the question by the Supreme Court is determinative:

> "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course. See United States Nav. Co. v. Cunard

S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247; Far East Conference v United States, 342 US 570, 577, 96 L ed 576, 583, 72 S Ct 492."

(*Pan American World Airways v. United States*, 371 U.S. 296, 312 n. 19; 9 L.ed. 2d 325, 337-38, n. 19).[29]

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29. Additional cases holding dismissal is the proper action include:

American Union Transp. v. River Plate & Brazil Conferences, 126 F. Supp. 91 (S.D. N.Y. 1954); *aff'd* 222 F.2d 369 (2d Cir., 1955);

Rivoli Trucking Corp. v. American Export Lines, 167 F. Supp. 937 (E.D. N.Y. 1958), in which the court at p. 940 gives primary jurisdiction as an alternative ground for dismissal;

Rivoli Trucking Corp. v. New York Shipping Ass'n, 167 F. Supp. 940 (S.D. N.Y. 1956); and see also

Rivoli Trucking Corp. v. New York Shipping Ass'n, 167 F. Supp. 943 (S.D. N.Y. 1957), which cites the 1956 dismissal in refusing motion for leave to file an amended and supplemental complaint;

United States v. Alaska S.S. Co., 110 F. Supp. 104 (W.D. Wash. 1952);

Wisconsin & Mich. Transp. Co. v. Pere Marquette L.S., 67 F.2d 937 (7th Cir. 1933), affirming dismissal by District Court, opinion unreported;

Swayne & Hoyt v. Kerr Gifford & Co., 14 F.Supp. 805 (E.D. La. 1935);

United States v. Borax Consolidated Ltd., 141 F.Supp. 396 (N.D. Cal. 1955).

CONCLUSION

We respectfully submit that the issues presented by the instant Petition confront the Court with no conflicts between circuits, with no new questions requiring consideration by the Court and with no questions of public importance. The issues presented have been fully settled by the *Cunard* and *Far East* cases which the Court of Appeals here correctly applied. Those cases are wholly consistent with other decisions announced by the Court on related questions under different regulatory schemes. Accordingly, the instant Petition for a Writ of Certiorari should be denied.

Dated: December 3, 1964.

EDWARD D. RANSOM
R. FREDERIC FISHER
LILLICK, GEARY, WHEAT, ADAMS &
CHARLES

Attorneys for Respondent Pacific Westbound Conference and its member lines.

CERTIFICATE OF SERVICE OF REPLY TO PETITION FOR A WRIT OF CERTIORARI

I, Edward D. Ransom, the undersigned, certify as follows: I am a member of the Bar of the Supreme Court of the United States and represent Pacific Westbound Conference, one of the respondents in the within case in its Reply to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on whose behalf service is hereby certified to was affected.

I certify that on December 3, 1964 I served three (3) copies of the within Reply to Petition for a Writ of Certiorari upon petitioner through its attorneys whose appearance have been entered herein and upon other parties respondent through the attorneys who have heretofore appeared for them, by mailing same first class mail at San Francisco, California, postage prepaid, as follows:

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Attorney for Respondent Federal Maritime Commission

Edward D. Ransom

In the Supreme Court of the United States

October Term, 1964

No. 657

Carnation Company, petitioner

v.

Pacific Westbound Conference, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL MARITIME COMMISSION

STATEMENT

Petitioner, Carnation Company, brought an antitrust action for treble damages against two shipping conferences, Pacific Westbound Conference (Pacific) and Far East Conference (Far East), and their members, individual shipping lines.[1] The complaint (Pet. App. 53),[2] alleged that the conferences and their members engaged in an unlawful combination to fix rates at which products would be transported from Pacific coast ports in the United States to the

[1] The chairmen of the two conferences were also named as defendants; the chairman of the Far East Conference was not served and did not appear.

[2] "Pet. App." refers to the appendix to the petition.

Far East, and that as a result, Carnation had been obliged to pay for the transportation of its products at rates unlawfully determined.

Pacific and Far East are conferences of shipping lines engaged in trade between the United States and the Far East. They are established pursuant to agreements under section 15 of the Shipping Act, 39 Stat. 733, as amended, 46 U.S.C. 814,[3] which requires rate-fixing agreements among common carriers by water to be filed with the Federal Maritime Commission and exempts approved agreements from the operation of the antitrust laws. The members of both conferences have entered into a further agreement (designated No. 8200), approved by the Commission, providing for joint action with respect to freight rates; this agreement, however, preserves the right of each conference to take independent action after giving notice to the other (Pet. App. 69).

Carnation's complaint alleged that the joint agreement was supplemented by a secret understanding, which was not submitted to the Commission, whereby Pacific surrendered its right to act independently except with respect to certain commodities. According to the complaint, rates for the transportation of Carnation's product by members of Pacific were increased, purportedly as an independent action of Pacific but in fact according to the secret agreement; in November 1957, Carnation asked Pacific to reduce the rates, and Pacific was willing to do so but refused because of Far East's objection. Carnation alleged

[3] The provisions of section 15 are set forth at Pet. App. 41.

that it did not learn about the secret agreement until May 1961. It claimed treble damages for the period from May 1957 to May 1962 when, it was alleged, the rates were lowered to their former level.

Carnation filed its complaint in December 1962. Much earlier, in October 1959, the Federal Maritime Board (predecessor of the Maritime Commission) had instituted proceedings to determine whether No. 8200 was "a true and complete agreement of the parties within the meaning of said Sec. 15, and whether it is being carried out in a manner which makes it unjustly discriminatory or unfair * * *" (Pet. App. 7). Carnation intervened in the administrative proceeding. The initial decision of the hearing examiner was filed in August 1963.

The district court granted the motion of the Maritime Commission (which had intervened in the antitrust suit) and the defendants to dismiss the complaint. (Pet. App. 3.) The court of appeals affirmed without deciding "whether there might ultimately arise out of the situation here presented a right to relief under the antitrust laws" (Pet. App. 34) (footnote omitted).[4] It held that under established principles primary jurisdiction to determine the issues presented was vested in the Maritime Commission. In concluding that the case should be dismissed rather than retained on the district court's docket, the court of appeals stated:

> The only possible reason for allowing the action to be retained on the district court docket

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[4] The opinion of the court of appeals is reported at 336 F. 2d 650.

> would be to avoid a claim that antitrust action was barred by the statute of limitations. Since we hold that such an action cannot at this date be maintained, this reason is not applicable here. [Pet. App. 34, n. 32.]

DISCUSSION

The questions involved in this case are whether the alleged secret agreement between Pacific and Far East "was made in fact; whether, if made, it was contrary to Agreement No. 8200; and finally, whether it would be required to be filed with and approved by the Commission" (Pet. App. 31). As the court below recognized, all of these questions call for the administrative experience and special knowledge of the Commission, the "administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade," *United States Navigation Co., Inc.* v. *Cunard Steamship Co., Ltd.,* 284 U.S. 474, 485. Accordingly, they should be determined by the Commission in the first instance. *United States Navigation Co., supra; Far East Conference* v. *United States,* 342 U.S. 570; *Federal Maritime Board* v. *Isbrandtsen Co., Inc.,* 356 U.S. 481, 498–499. The principles of primary jurisdiction are particularly applicable in this case, since, long before the complaint was filed, the Commission had undertaken an investigation involving the very questions at issue here and presently has those questions under consideration.[5]

[5] Even if one were to assume that the Commission will decide all of the questions adversely to the conferences and the shipping

It would, therefore, be premature for this Court to decide the substantive issue, not passed upon below, of whether petitioner ultimately will have a remedy under the antitrust laws. The Commission's rulings in the proceeding pending before it may render that issue moot and will, in any event, "prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination * * * of the scope and meaning of the statute as applied * * *" (*Isbrandtsen, supra,* at 498–499), to this case.

The remaining issue is what disposition of the case should have been made in the district court. Under section 4B of the Clayton Act, 69 Stat. 283, 15 U.S.C. 15b, an action for treble damages under the antitrust laws must be commenced within four years after the cause of action accrues.

While the law is not entirely settled, May 1961, when petitioner found out about the alleged secret agreement according to the complaint, appears to be the latest date from which the statute of limitations would run on any antitrust claims that petitioner may have. See, *e.g., Allis-Chalmers Mfg. Co.* v. *Commonwealth Edison Co.,* 315 F. 2d 558. Since the proceedings before the Commission may not be finally terminated before May 1965, there is a possibility, under the disposition below, that antitrust claims of petitioner might ultimately be deemed barred by the statute

lines, the doctrine of primary jurisdiction would be applicable. Compare *Far East Conference, supra,* with *Isbrandtsen, supra.* Of course, no such assumption is warranted at this stage of the proceedings before the Commission.

of limitations.[6] In order to preclude this result of allowing the Commission to exercise primary jurisdiction, the case, we believe, should have been retained on the docket of the district court pending the termination of the administrative proceeding. See *Far East Conference, supra*, at pp. 576–577; *Isbrandtsen, supra*, at 498–499; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433.[7]

If the Court agrees with our views on the issues which relate to the primary jurisdiction of the Commission, we suggest that the question of adopting the protective measure to which we have referred is not one which would require a plenary hearing.

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[6] There is no statutory provision which suspends the running of the statute of limitations while the case is pending before the Maritime Commission.

[7] In *Far East Conference, supra*, the Court observed that it could either order the case retained on the district court docket pending the conclusion of administrative proceedings or could order the case dismissed. It took the latter course, saying: "We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate." 342 U.S. at 577. That case involved a government suit for an injunction, and no limitations problem was involved.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should grant the writ of certiorari, vacate the judgment below and remand with directions to retain the case on the docket of the district court pending the termination of the administrative proceeding.

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DECEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 657

CARNATION COMPANY,

Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION FOR RESPONDENTS, FAR EAST CONFERENCE, AND MEMBERS AND CERTAIN FORMER MEMBERS THEREOF NAMED AS DEFENDANTS

Reason for Submission

This Supplemental Brief in Opposition to the petition is occasioned not by afterthoughts regarding the petition itself, but by the memorandum for the Federal Maritime Commission filed herein. In that memorandum, the Commission, speaking through the Solicitor General, has taken a position quite inconsistent with the position which, speaking for itself, it took in the courts below. It is also a position different from that taken by any other party in this Court.

We seek this opportunity to deal solely with the new contention injected by the Commission's memorandum.

Statement

The Commission urges here that this Court grant the writ of certiorari, vacate the judgment below, and remand the cause with directions to retain the case on the docket of the district court pending the determination of the administrative proceeding. Such a disposition of the matter must assume that there is an eventuality which may arise at the conclusion of the pending administrative proceeding and any judicial review thereof, which would leave unadjudicated some claim in the present complaint which could be the foundation for antitrust relief. The Commission's memorandum avers (p. 5) that the issue of whether petitioner ultimately will have a remedy under the antitrust laws was not passed upon below. We submit that the court of appeals clearly ruled that the present complaint states no claim for antitrust relief.

Thus, the court of appeals stated (336 F. 2d at 653) that motions to dismiss, on the ground that the Shipping Act provides the *exclusive* remedy for the alleged wrongs and that the district court lacked jurisdiction, had been granted, and that two decisions of this Court plainly supported and required dismissal by the district court. Again (336 F. 2d at 657), the court of appeals stated that it felt called upon to expand on the reasons why "exclusive primary jurisdiction must be upheld here." The court of appeals

was troubled by a small portion of the opinion in *Far East Conference* v. *United States,* 342 U.S. 570, 576-7 (1952), but resolved its doubts in favor of dismissal. This it did, "Since we hold that such an action [an antitrust suit] cannot at this date be maintained * * *." (336 F. 2d at 667, n. 32).

We submit that there is no eventuality reasonably to be suggested in which there could be a basis for an antitrust proceeding arising out of the present complaint. The Commission's memorandum is no help. The questions which, it states, are involved in the case are, it agrees, Shipping Act questions (memorandum, p. 4). Nowhere does it suggest what questions under the antitrust laws may be involved in the complaint now, or may somehow be materialized by reason of the Commission's disposition of its administrative inquiry into the very transactions alleged in the complaint.

Petitioner predicates its claim for relief upon concerted action of the respondents to enhance ocean freight rates. Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended by 75 Stat. 763 (46 U.S.C. §814), clearly confers upon the Commission jurisdiction to deal with agreements among common carriers by water, "fixing or regulating transportation rates or fares", or "controlling, regulating, preventing, or destroying competition", or "in any manner providing for an exclusive, preferential, or cooperative working arrangement." The term "agreement" in §15 includes "understandings, conferences, and other arrangements." It was clear below, both to the district court and to the court of appeals, that the agreement and conspiracy charged in the complaint was

within the Commission's jurisdiction under §15. The Commission is exercising its jurisdiction in its pending Docket No. 872 (*In the Matter of Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference,* initial decision served August 30th, 1963, 2 Pike & Fischer Ship. Reg. Rep. 900). Petitioner has indeed availed itself of that jurisdiction by intervening in F.M.C. Docket No. 872. It could equally readily have filed with the Commission a complaint seeking reparation for alleged violations of §15. Sec. 22 of the Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. §821).

If the Commission's jurisdiction under §15 is exclusive[1] as well as primary, there can be no basis for judicial proceedings under the antitrust laws, now or after the ultimate disposition of F.M.C. Docket No. 872. That being so, the only proper disposition of this case is that which was adjudged below, *i. e.,* dismissal.

It may be observed that the Commission, in the district court, moved to dismiss without any suggestion of retention on the docket (R. 34). The district court so understood the Commission's position (R. 65), as did the court of appeals (336 F. 2d at 653).

Now that the Solicitor General has exercised his prerogative of controlling the litigation on behalf of the Commission, we find an abrupt departure from the

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[1] Subject, of course, to judicial review proceedings under the Judicial Review Act (Federal Agencies), 64 Stat. 1129, as amended (5 U.S.C. §§1031, *et seq.*).

Commission's approach below. Herein, we submit, lies confirmation of the validity of the supersession doctrine, and one of the premises on which it relies. Inevitably, the agency charged by Congress with the administration of the specialized regulatory statute will, when the philosophy of that statute differs radically from the philosophy of the antitrust laws, find itself in conflict with the agency of Government charged with the enforcement of the antitrust laws. This much was made clear in *Far East Conference* v. *United States,* 342 U.S. 570 (1952), where the Commission intervened to urge dismissal of an antitrust suit brought by the Attorney General. The Commission's position was upheld, partly to avoid the stultification of the Government and the harassment of industry which must result from coordinate inconsistent regulatory commands. 342 U.S. at 575.

The Memorandum for the Commission seizes on a single sentence in the opinion in *Far East Conference* as an intimation of precedent for the suggestion that jurisdiction of this suit be retained. There, this Court stated, after observing that there was no purpose in retaining jurisdiction (342 U.S. at 577), "A similar suit is easily initiated later, if appropriate." The circumstances which would render such a later suit appropriate were not explained. The reason for the quoted expression may be found in the Court's discussion (342 U.S. at 576) of the Government's contention that it might not have standing to complain before the Commission. Although the Court dismissed this suggestion as "almost frivolous", it may be against this improbable possibility that the door was left open to reinstitution of the court proceedings.

Otherwise, the sentence regarding institution of a later suit is most difficult to explain. The decision and opinion in *United States Navigation Co.* v. *Cunard Steamship Company, Ltd.*, 284 U.S. 474 (1932), was fully reaffirmed in *Far East Conference.* This Court said of the governing effect of *U.S. Navigation Co.* (342 U.S. at 576):

> "* * * The same considerations of administrative expertise apply, whoever initiates the action. The same Antitrust Laws and the same Shipping Act apply to the same dual-rate system. To the same extent they define the appropriate orbits of action as between court and Maritime Board."

In *U.S. Navigation Co.*, after observing that the wrongs charged constituted violations of the Shipping Act, this Court stated (284 U.S. at 485), "the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws." Again, in disposing of the argument that failure to file an agreement gives the basis for an antitrust proceeding, this Court said (284 U.S. at 486):

> "* * * But a failure to file such an agreement with the board will not afford ground for an injunction under §16 of the Clayton Act at the suit of private parties—whatever, in that event, may be the rights of the government—since the maintenance of *such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist.* If there be a failure to file an agreement as required by §15, the board as in the case of other

violations of the act, is fully authorized by §22, supra, to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under §31, *for the first time*, open to a judicial proceeding to enforce, suspend or set them aside * * *." (Italics supplied.)

We submit that this decision, reaffirmed in *Far East Conference*, could not more clearly hold that any subject matter within the coverage of the Shipping Act is to be dealt with exclusively under the Shipping Act.

There being no matters alleged in the present complaint which are not within the Commission's jurisdiction under the Shipping Act,[2] the complaint was properly held below to be insufficient and ordered to be dismissed.

Finally, we point out that the Commission's suggestion involves a fundamental and important issue with respect to the meaning and scope of the supersession and exclusive primary jurisdiction doctrines. Accordingly, we submit that it would be inappropriate to act on the suggestion except after a plenary hearing.

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[2] The court of appeals summarized the questions for the Commission, raised by the complaint, in its *per curiam* opinion denying the petition for rehearing (336 F. 2d at 668)

Conclusion

The suggestion of the Federal Maritime Commission should be rejected and the petition should be denied.

Respectfully submitted,

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New York, N. Y.
December 17, 1964.

COPY

FILED

DEC 19 1964

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 20

CARNATION COMPANY, a corporation,
Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Supplemental Brief in Opposition For Respondent Pacific Westbound Conference

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In the Supreme Court of the United States

October Term, 1964

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Carnation Company, a corporation,
Petitioner,
vs.
Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Supplemental Brief in Opposition For Respondent Pacific Westbound Conference

REASON FOR SUBMISSION

This Supplemental Brief is necessitated by the startling position taken in the Memorandum for the Federal Maritime Commission filed by the Solicitor General. In the courts below the Federal Maritime Commission advocated dismissal of the Complaint. Contrary to the Commission's position before the courts below and without any request by peti-

tioner at any stage in the proceedings, the Memorandum asserts that the district court should have retained jurisdiction of the case pending the outcome of proceedings before the Commission.

STATEMENT

In the district court the Commission intervened to move for dismissal of petitioner's antitrust complaint (R. 32-35). It supported this motion with lengthy memoranda. The court granted the motion of the Commission and of other defendants. Thereafter, before the court of appeals, the Commission vigorously and successfully argued that the dismissal of the antitrust complaint be affirmed. At this late stage, speaking through the Solicitor General and the Department of Justice, the Commission, while fully supporting the position of the courts below that primary jurisdiction is in the agency, for the first time asserts that the district court erred in failing to retain the case or stay the proceedings.

It is well settled, however, that a party that has not taken an appeal, or, further, petitioned the Supreme Court for certiorari cannot question the correctness of the decree entered by the trial court (e.g. *Alaska Industrial Bd. v. Chugach Electric Ass'n,* 356 U.S. 320, 325, 2 L. ed 2d 795, 798 (1958); *Mechanics Universal Joint Co. v. Culhane,* 299 U.S. 51, 58, 81 L. ed 33, 38 (1936); *Federal Trade Comm'n v. Pacific States Paper Trade Ass'n,* 273 U.S. 52, 66, 71 L. ed 534, 539 (1927); *United States v. Blackfeather,* 155 U.S. 218, 221, 39 L. ed 126, 127 (1894)). Yet that is what the Commission, purely a respondent here, seeks to do.

Assuming for the purposes of argument that respondent Commission may raise this issue for the first time in a

Memorandum answering the Petition for Certiorari, the Commission's position is both manifestly incorrect and founded on an assumption that is directly contradicted by the Commission's position and statements below. The rationale of the Commission's "Memorandum" is that the case should be retained because (1) there might remain some antitrust remedy available to petitioner after action by the Commission on the issues, and (2) that remedy might in the interim become time barred.

This position fails to recognize that *all* issues raised by the Complaint are covered by the Shipping Act and therefore under the rule of *United States Nav. Co. v. Cunard S.S. Co.,* 284 U.S. 474, 76 L. ed 408 (1932) and *Far East Conference v. United States,* 342 U.S. 570, 96 L. ed 576 (1952) the antitrust acts which would otherwise be applicable to the complaint are superseded.

The Complaint alleges a secret agreement or agreements between ocean carriers setting a rate in foreign commerce. There has never been any question that *all* charges in the Complaint state violations of the Shipping Act. As the Petition for a Writ of Certiorari expresses it: "It is readily apparent that defendants' conduct cannot be squared with the Sherman Act (see Note 4, p. 4 above) *nor with the Shipping Act § 15*" (p. 13, emphasis supplied).

The Memorandum for the Commission at page 4 lists the questions in this case as "[1] whether the alleged secret agreement between Pacific and Far East 'was made in fact; [2] whether, if made, it was contrary to Agreement No. 8200; and finally, [3] whether it would be required to be filed with and approved by the Commission.'" Since the Commission now proposes that the District Court retain the case on the docket "pending the termination of the administrative proceeding," *an essential inquiry is what possible*

decision could the agency make on the three questions which would leave anything for decision by the District Court if the action were retained. The Memorandum for the Commission suggests none. We shall demonstrate that there are none.

Thus, as to Question 1, above, if the determination of the Commission is that the alleged secret agreement was *not* "made in fact," plaintiff's grounds for complaint are non-existent. If the determination is that it was made, the Commission then proceeds to Questions 2 and 3.

As to Question 2, Agreement No. 8200 is an agreement already approved by the Commission. If the alleged agreement is contrary to the Commission's *own* order of approval, Shipping Act sanctions manifestly apply. If, on the other hand, the Commission decides that the alleged agreement was not contrary to Agreement 8200, it therefore already has the Commission's approval pursuant to Section 15. In either event, there is no issue remaining for decision by the District Court.

As to Issue 3, if the Commission's determination is that the alleged agreement was *not* required to be filed with and approved by the Commission, it could only be because the agreement had already been approved either as part of the separate agreements of one or both of the Conferences or as part of Agreement 8200, the joint agreement between the Conferences. If the Commission decides that the alleged agreement *was* required to be filed with and approved by it, this would only be because the claimed agreement was not covered by the already approved agreements. Admittedly the agreement alleged was not separately filed. Further, it is not possible in this case to decide that the claimed agreement relates to a subject matter outside the scope of the Shipping Act. Accordingly, a decision on Issue 3 that

the alleged agreement was required to be approved by the Commission invokes the sanctions and the remedies of the Shipping Act, which as *Cunard* and *Far East* so clearly determine, are exclusive."[1]

On analysis, therefore, no matter how the Commission could determine the three issues, nothing remains for the District Court. This, until now, has always been the position of the Commission.[2]

Undoubtedly there are some situations in which complete supersession is inapplicable and stay is the proper course. A typical example is where doubt exists whether the matter alleged in the court action falls within the jurisdiction of the agency. Under the doctrine of primary jurisdiction the matter is stayed pending agency determination of its own jurisdiction. Another example is the situation suggested in the *Far East* case where the District Court action is ". . . only incidentally a question proper for initial administra-

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1. See full discussion Brief of Respondent Pacific Westbound Conference in Opposition to Writ of Certiorari, Sections IV A and B, and Respondent Far East Conference's Brief, pp. 5-7.

2. In its initial Memorandum in Support of Motion to Dismiss, filed with the District Court, it stated, at page 5:

> "Thus, not only are the acts alleged in the complaint proscribed by the Shipping Act, but also plaintiff has an available remedy for the wrongs it alleges by way of complaint before the Federal Maritime Commission under section 22 of the Shipping Act."

In its Answering Brief before the Court of Appeals the FMC stated, at page 4:

> "The issues raised by the complaint, i.e., whether and to what extent the carriers exceeded the limits of their approved agreement, are currently pending before the Maritime Commission in a formal proceeding instituted by the Commission on its own motion."

And in that brief the Commission reiterated the position that the Shipping Act provides the "exclusive remedies" for the wrongs alleged in the complaint (p. 11) and that the Commission is the "exclusive forum for the determination of these issues" (p. 25).

tive decision . . ." (*Far East Conference v. United States*, 342 U.S. at 577).

But as this Court recently stated in *Pan American World Airways, Inc. v. United States:*

> "We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed." (371 U.S. 296, 313; 9 L. ed 2d 325, 337 (1936))

and

> "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course. See United States Nav. Co. v. Cunard S. S. Co., 284 U.S. 474, 76 L. ed 408, 52 S.Ct. 247; Far East Conference v. United States, 342 U.S. 570, 577, 96 L. ed 576, 583, 72 S.Ct. 492." (Ibid at 313 n. 19, 9 L. ed 2d at 337-338, n. 19)[3]

Although the *Far East* decision did discuss the possible alternatives of retention or dismissal, as discussed in intervener's Memorandum, footnote 7, page 6, the decision was that dismissal was the proper course because ". . . the present case involves questions within the *general scope of the Maritime Board's jurisdiction*" (p. 577) (emphasis supplied). This was the true ground for dismissal in the *Far East* case.[4]

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3. See citation of additional authority to the same effect, p. 33, footnote 29 of Brief of Respondent Pacific Westbound Conference in Opposition to the Writ.

4. Intervener Federal Maritime Commission in its Memorandum in Support of Its Motion to Dismiss filed in the District Court included a separate section entitled, "The Circumstances Here Require Dismissal Rather Than Stay" in which among other things it stated:

> "As indicated in *Far East Conference*, when a matter is within the general scope of the agency's jurisdiction, as is the instant case, dismissal is proper."

CONCLUSION

The request on behalf of the Federal Maritime Commission should be rejected. Dismissal is the only proper course. The petition should be denied.

Dated: December 17, 1964.

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R. Frederic Fisher
Lillick, Geary, Wheat, Adams & Charles

Attorneys for Respondent Pacific Westbound Conference, and its member lines.

CERTIFICATE OF SERVICE OF SUPPLEMENTAL BRIEF IN OPPOSITION FOR RESPONDENT PACIFIC WESTBOUND CONFERENCE

I, Edward D. Ransom, the undersigned, certify as follows:

I am a member of the Bar of the Supreme Court of the United States and represent Pacific Westbound Conference, one of the respondents in the within case on whose behalf service is hereby certified to was affected.

I certify that on December 17, 1964 I served three (3) copies of the within Supplemental Brief in Opposition for Respondent Pacific Westbound Conference upon petitioner through its attorneys whose appearance have been entered herein and upon other parties respondent through the attorneys who have heretofore appeared for them, by mailing same first class mail at San Francisco, California, postage prepaid, as follows:

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EDWARD D. RANSOM

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 20

CARNATION COMPANY, a corporation,
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vs.
PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Petitioner's Brief

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In the Supreme Court

of the

United States

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No. 20

CARNATION COMPANY, a corporation,
Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons,[1] defendants, and Federal Maritime Commission, intervener,
Respondents.

Petitioner's Brief

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1. The other respondents are the other defendants and appellees below. They are named in the complaint in the caption (R 9-11) and in paragraphs 6-8, 10, 13 (R 13-18).

I.

NATURE OF THE CASE

This case is here on a writ of certiorari, granted March 1, 1965 (R 203), to review a decision of the United States Court of Appeals for the Ninth Circuit (R 157-188, rehearing denied R 200, 201) affirming a judgment of the United States District Court for the Northern District of California, Southern Division (R 138, 139) dismissing an action for treble damages brought under the Sherman Act and the Clayton Act (Part IV, pp. 4, 5 below). The writ was granted on presentation of an important question of relation of the antitrust statutes and their operation to the provisions of an industry regulating statute, the Shipping Act, 1916 (Part IV hereof, p. 5 below), dealing with carriage by water in *foreign* commerce as defined in § 1 of that Act (App. p. 2) and the administration of those provisions.

Petitioner, a shipper by common carrier by water in *foreign* commerce, sued to recover, from the carriers and others, including two conferences of the carriers, treble damages based on a $2.50 per ton tariff overcharge imposed, as an increase over the theretofore lawfully established rate, as a result of a conspiracy in violation of the antitrust statutes in the form of an agreement (for fixing rates) unapproved under the Shipping Act, 1916. On motions of defendants (before they had filed any answer) (R 26-32) and of the Federal Maritime Commission, intervener,[2] (R 34, 35) the action was dismissed *in limine* "on the grounds that primary jurisdiction of the action is in the Federal Maritime Commission" (Jud't, R 138, 139), by reason of the Shipping Act, 1916. As in *McLean Trucking Co. v. United States*, 321 US 67,

2. The Commission did file an answer (R 36, 37). It was careful *not* to deny any of the averments of the complaint and stated that "To the extent that the rules of pleading require an assumption of the admission or denial of the allegations of the complaint * * * such assumption is made."

79 ff (and *Minneapolis & St. L. R. Co. v. United States*, 361 US 173, 185 ff, and other cases below) there was "a problem of accommodation" of an industry statute which contemplates "some diminution of competition" and possible "creation of monopolies", with a statute of general application and broad policy, the Sherman Act, making illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations".

Although the Shipping Act, 1916 § 15 (App. pp. 5-7) dealt with this problem of accommodation by providing that agreements approved under that Act should be lawful, and that *such* agreements "shall be excepted from the provisions of the" antitrust statutes,—"*Approved* agreements are exempted from the antitrust laws." (*F.M.B. v. Isbrandtsen Co.*, 356 US 481, 491),—the result of the decisions below is the same for *unapproved* agreements so far as operation of the antitrust statutes is concerned—the *unapproved* agreements are also "excepted" from Sherman Act § 1 and Clayton Act § 4 (App. p. 1).

II.

OPINIONS BELOW

The memorandum opinion of the District Court (R 137, 138) is not reported.

The opinion of the United States Court of Appeals for the Ninth Circuit (R 157-187) and its memorandum denying petitioner's petition for a rehearing (R 200, 201) are reported in 336 Fed 2d 650-668 and unofficially in CCH 1964 Trade Cases, ¶ 71196, p. 79764.

III.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked upon the ground that a federal question is presented which this Court has jurisdiction to review in that (a) the jurisdiction of the District Court was

properly invoked as the action was one to recover treble damages arising under the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 as amended and particularly § 1 (the Sherman Antitrust Act, 15 USC §§ 1-7),[3] the Act of Congress of October 15, 1914, c. 323, 38 Stat. 730, as amended particularly § 4 (the Clayton Act, 15 USC §§ 12-27)[3] and Judicial Code §§ 1331 and 1337 (28 USC §§ 1331, 1337), (R 11 ff), (b) the action was dismissed by the District Court upon the asserted ground that primary jurisdiction was in the Federal Maritime Commission by reason of the Shipping Act, 1916 (Act of Sept. 7, 1916, c. 451, 39 Stat. 728 as amended, 46 USC § 801 ff)[3] (R 137-139) and (c) on appeal to the Court of Appeals for the Ninth Circuit (R 140-147)[4] it affirmed on this ground (R 157 ff).

The judgment of the Court of Appeals sought to be reviewed was rendered July 30, 1964 (R 157, 187) and was entered on that day (R 156, 187). A petition for rehearing, filed Aug. 27, 1964 (R 188 ff) and within time (U.S. Ct. App., Cir. Ninth, Rule 23), was entertained and denied on September 28, 1964 (R 200, 301).

Judicial Code § 1254(1) (28 USC § 1254(1)) confers on this Court jurisdiction to review the judgment in question by writ of certiorari. The petition to that end was filed November 6, 1964, within time (Judicial Code § 2101(c), 49 USC § 2101(c)) and the case was docketed as No. 657. The petition was granted March 1, 1965.

IV.

STATUTES INVOLVED

The statutes directly involved are:

The Sherman Act, Acts of July 2, 1890, c. 647, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282, §§ 1, 2 and 8 (15 USC §§ 1, 2 and 7);

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3. The pertinent provisions of the statutes are set out in the Appendix to this Brief.

4. Judicial Code §§ 1291 and 2107 (28 USC §§ 1291 and 2107) and Federal Rules of Civil Procedure, Rules 54 (b) and 73. (*U.S. v. Price-McNemar Const. Co.*, 320 F.2d 663, 664 (Cir. 9))

The Clayton Act, Act of October 15, 1914, c. 323; § 4, 38 Stat. 731 (15 USC § 15); and

Shipping Act, 1916, Acts of Sept. 7, 1916, c. 451, 39 Stat. 728; July 15, 1918, c. 152, 40 Stat. 900 (46 USC § 801ff) [later amended Sept. 19, 1961, Pub. L. 87-254, 75 Stat. 522] in so far as it regulated common carriage by water in *foreign* commerce.

Also involved, for their effect on the provisions of Shipping Act, 1916, dealing with *interstate* commerce and the contrast they provide between the schemes of regulation adopted by it for common carriage by water in *foreign* commerce (as defined in Shipping Act, 1916, § 1) and the Congressional scheme of regulation of common carriage between points in the United States are:

Intercoastal Shipping Act, 1933, Act of Mar. 3, 1933, c. 199, 47 Stat. 1425 as amended June 23, 1938, c. 600, § 43, 52 Stat. 964, June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016, Aug. 4, 1939, c. 417, § 2, 53 Stat. 1182, and 1950 Reorg. Plan No. 21, §§ 104(2), 305, 306, 64 Stat. 1274, 1277 (46 USC §§ 843-848); and

Part III of the Interstate Commerce Act (Transportation Act of 1940), Act of Sept. 18, 1940, c. 722 Title II, § 201ff, being Part III of the Interstate Commerce Act, § 301ff as amended (49 USC, ch. 12, §§ 901-923).

The provisions of these statutes are very lengthy and, accordingly, they are set out in the Appendix to this Brief.

V.

THE QUESTIONS PRESENTED

It has not been questioned that, unless something can be pointed to which makes inapplicable the antitrust statutes, the defendants were guilty of violation of the Sherman Act which resulted in injury to the plaintiff in its business and property, for which it can sue under Clayton Act § 4 and recover threefold the damages sustained and cost of suit, including a reasonable attorney's fee.[5]

The gist of the complaint is that by an unapproved agreement the defendants increased the rate for carriage by water from the Pacific Coast to Manila by $2.50 per ton and plaintiff, a shipper of evaporated milk, was forced to pay this increase. It has long been settled that "price-fixing agreements are unlawful *per se* under the Sherman Act" (*United States v. Socony-Vacuum Oil Co.*, 310 US 150, 218, 223ff; *White Motor Co. v. United States,* 372 US 253; *No. Pac. R. Co. v. U. S.*, 356 US 1, 5; *Simpson v. Union Oil Co.*, 377 US 13; *United States v. Parke, Davis & Co.*, 362 US 29; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 US 211; *United States v. Du Pont,* 351 US 377, 387; *United States v. Trenton Potteries Co.*, 273 US 392; *Addison Pipe & Steel Co. v. United States,* 175 US 211). The rule applies to rates of carriers unless some special immunity can be found (*United States v. Trans-Missouri Freight Ass'n,* 166 US 290; *United States v. Joint-Traffic Ass'n,* 171 US 505; *Georgia v. Penn. R. Co.*, 324 US 439, 456; *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 US 474, 480; *Isbrandtsen Co. v. United States,* 211 F2d 51, 57 (Cir. Dist. Col.), c. d. 347 US 990). The result is not different because the basic agreement was reached before the change in rate complained of (*United States v. Trans-Missouri Freight Ass'n,* 166 U.S. 290; *United States v. Joint-Traffic Ass'n,* 171 US 505; *Silver v. N. Y. Stock Exchange,* 373 US 341, note 5[6]) nor because of the fact, if it be the fact, that the basic agreement may be one only for a veto power on the change of rates (*Georgia v. Penn. R. Co.*, 324 US 439, 458[7]).

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5. Sherman Act §§ 1, 2, Clayton Act § 4, App. p. 1.

6. "The fact that the consensus underlying the collective action was arrived at when the members bound themselves to comply with Exchange directives upon being admitted to membership rather than when the specific issue of Silver's qualifications arose does not diminish the collective nature of the action. A blanket subscription to possible future restraints does not excuse the restraints when they occur."

7. Holding there was "no warrant in the Interstate Commerce Act" for clothing with legality a conspiracy "to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier."

The defendant carriers, however, were subject to the Shipping Act, 1916. It was claimed that the facts relied on by Petitioner constituted a violation of that Act and that Petitioner's sole remedy was under that Act. The Court of Appeals held that if there might be a remedy under the antitrust statutes still, before it could be invoked, there were matters which must be decided by the agency charged with administration of the Shipping Act, the Federal Maritime Commission and, in such circumstances, the case should not be retained, awaiting the outcome of Commission action, but should be dismissed. The questions presented are:

1. Have the antitrust statutes been repealed by the Shipping Act by implication as to conduct of carriers in foreign commerce which is subject to the Shipping Act?

2. Where conduct in violation of the antitrust statutes also violates the Shipping Act is the only remedy of a party aggrieved under the Shipping Act and, if so, might he not then improperly be deprived of a right of trial by jury?

3. Where Congress, in an industry statute (here the Shipping Act) which applies to conduct which also falls within the antitrust statutes, has provided the means of accommodation of the two statutes and the test for determining application of the antitrust statutes, by providing in the industry statute that specified conduct is excepted from the antitrust statutes *when approved* by an administrative agency set up to administer the industry statute,[8] is not such approval the only way of denying full application of the antitrust statutes and complete availability of their remedies? Does the mere existence of a power to exempt have the same effect as an exemption granted under the power? Can *United States v. Borden Co.*, 308 US 188, 197ff be ignored?

4. When the only possible issues involved in the claim for *damages* under the antitrust statutes on account of past conduct are (a) whether an agreement to fix rates was made, (b) whether

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8. Shipping Act, § 15, App. p. 5ff.

it was carried out to plaintiff's damage and (c) whether it was in fact not filed with and not approved by the Federal Maritime Commission, are not these antitrust issues for the court and not questions for the agency charged with administration of the Shipping Act?

5. Are not *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 US 474 and *Far East Conference v. United States*, 342 US 570, whether rightly or wrongly decided, to be restricted to their own facts, and restricted to their holding that judicial relief *in specie*, with prospective operation which well *may interfere with the proper function of an administrative agency* in the sphere committed to it by Congress, will be withheld till the result of administrative action is seen? Are they not without application where all that is sought is a judicial award of damages for illegal past conduct *which no administrative action can now cure* and where the awarding of damages by a court will no more interfere with the regulatory scheme and the functioning of the agency set up to administer it *than would an award of reparations by the agency itself?* Is not this case within the reservation from operation of the primary jurisdiction rule spelled out in *Pan-American World Airways, Inc. v. United States*, 371 US 296, 304?

6. Is not the case a simple one of an overcharge of \$2.50 a ton made illegal because imposed as the result of a price fixing agreement which, being unapproved so as to exempt it, violated the antitrust statutes and is it not a case typical of cases appropriate for judicial disposition under Clayton Act § 4?

7. In any event was it not error to dismiss rather than to hold waiting agency action if any such action was required?

VI.

STATEMENT OF THE CASE

A. Proceedings Below

Carnation Company commenced this action against 2 steamship "conferences" of water carriers operating from the United States

to the Far East, the members of those conferences and the Chairman of each conference, to recover treble damages under the Sherman Act and the Clayton Act for violations, by the defendants, of these acts. **The complaint** (R 9-25) shows: Plaintiff sold evaporated milk in foreign commerce,, and shipped it from Pacific Coast ports to Manila. The members of defendant Pacific Westbound Conference (PWC) were the only carriers providing regular berth service from Pacific Coast to the Far East. Plaintiff was required to use their service. The defendants (PWC, its members and others) entered into a conspiracy and agreement to fix the rates for that service and carried out that conspiracy. This agreement was never approved under the Shipping Act. As a result, over plaintiff's protest, on May 1, 1957, the theretofore lawfully fixed rates were increased $2.50 per ton, a request by plaintiff, in November, 1957, to reduce the rates to what they had been before this increase was denied and the $2.50 per ton increase was kept in effect until May 7, 1962. The plaintiff did not pass on this increase to its customers and, as a result, it was damaged in the amount of $343,276.70 which it seeks to recover, trebled, as provided in the Antitrust Statutes, together with a reasonable attorney's fee and costs.

The jurisdiction of the District Court was invoked under §§ 1 and 2 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, §§ 1 and 2, 15 USC §§ 1, 2), § 4 of the Clayton Act (Act of Oct. 15, 1914, c. 323, 38 Stat. 731, § 4, 15 USC § 15) and §§ 1331, as amended, and 1337 of the Judicial Code (28 USC §§ 1331, as amended, and 1337). (R 12)

Proceedings on motions to dismiss were the only proceedings had. All of the defendants, except one,[9] before any other proceedings were had, appeared by motions to dismiss and have raised no factual issue. The Federal Maritime Commission, permitted to intervene for the same purpose, filed an answer which created

9. James A. Dennean, Chairman of the Far East Conference. He was not served. Certain parties, joined as defendants by mistake, were dismissed by agreement.

no factual issue[10] and moved to dismiss. The defendants and intervener, for good reason,[10] have elected to proceed without creating issues of fact.

The Far East Conference (FEC) and members and former members **moved to dismiss** the action (R 26-29) upon the grounds that the complaint failed to state a claim upon which relief could be granted in that its charges constitute "violations of the provisions of the Shipping Act, 1916, as amended, which, to the extent of said acts and charges, supersedes the antitrust laws * * * the remedy * * * is that afforded by the Shipping Act, 1916, as amended" and the court "is without jurisdiction of the subject matter" in that agreements about rates are within the "exclusive jurisdiction of the Federal Maritime Commission"; the acts of defendants are subject to the jurisdiction, supervision and regulation of that Commission which is authorized to afford a remedy and there is pending a proceeding before the Commission in which the plaintiff has intervened and in which substantially the same issues will be decided.

Pacific Westbound Conference (PWC), defendant Galloway, its chairman, and its members appeared by **motion to dismiss** (R 30-32) on the ground that the Shipping Act, 1916, as amended "provides the exclusive remedy for each and every wrong alleged by said complaint and that, as a consequence this Court is without jurisdiction to proceed as the matter is subject to the exclusive primary jurisdiction of the Federal Maritime Commission."

The Federal Maritime Commission moved to intervene "as a defendant * * * for the purpose of moving this court to dismiss" and submitted a **motion to dismiss** on the ground that the Shipping Act, 1916, "provides the exclusive remedy for the wrongs alleged in the complaint and therefore this honorable Court is without jurisdiction in this matter." (R 33-36)

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10. See footnote 2 above. See proceedings before the Commission, see Part IX, below.

With their motions, PWC and the Commission submitted the affidavit of Thomas Lisi, Secretary, Federal Maritime Commission (R 37-59). Its principal contribution was to supply, as Exhibit 5, a copy of "Agreement 8200". (R 45-59)

Plaintiff objected to intervention (R 60-62).

The court granted the Commission's application to intervene and ordered further argument. (R 108, 109) The court then filed a **memorandum opinion and order** (137, 138) **granting the motions to dismiss** on the ground that the Shipping Act "provides a remedy for any violation of the Act", that "to carry out a rate agreement between carriers before approval of the Commission is an unlawful violation of the Act", this issue is tendered by plaintiff's complaint, the Supreme Court "has held that the antitrust laws are superseded to the extent that the Shipping Act provides a remedy" and authorities cited "are well-established precedents for applying the doctrine of exclusive primary jurisdiction to the Shipping Act in the present case."

Judgment (R 138, 139) accordingly was entered that

> "the court having filed herein a Memorandum of Opinion granting said Motions to Dismiss on the ground that primary jurisdiction of the action is in the Federal Maritime Commission:
>
> IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff's action be, and the same is hereby dismissed."

On appeal to the United States Court of Appeals for the Ninth Circuit (R 140-147) the judgment of the District Court was affirmed (R 157-188) and a petition for rehearing (R 188-199) was denied (R 200, 201). (Part III, p. 4 above.)

B. The Facts

The facts appear from Petitioner's Complaint (R 9-25) and the Lisi affidavit, particularly its Exhibit 5, Agreement No. 8200 (R 37-59),[11] and are undisputed.[12] These are the facts:[13]

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11. The only other matter dealt with was by some references to proceedings, instituted by the Commission on its own motion, looking

Carnation Company, was a shipper of evaporated milk in foreign commerce from the Pacific Coast to the Philippine Islands by defendant common carriers by water, members of defendant Pacific Westbound Conference (PWC) (par. 4, 5, 29).

Defendant common carriers from the United States to the Far East (par. 4, 6-8) fell into 3 groups, (1) those operating only from Pacific Coast ports (par. 6), (2) those operating only from the Atlantic Coast and/or Gulf of Mexico ports (par. 7), and (3) those operating both from Atlantic Coast and/or Gulf ports and from Pacific Coast ports (par. 8). Those operating from Pacific Coast ports (members of PWC) were the only carriers providing general cargo and regular berth service on substantially regular routes and with regular sailing from Pacific Coast ports of the United States to the Far East and were the only carriers by whom the plaintiff could ship to Manila (par. 11, 29).

Before January 1953 these carriers from Pacific Coast ports to the Far East associated themselves together under Pacific Westbound Conference Agreement No. 57 to form the Pacific Westbound Conference for the purpose, among other things, "of

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into some of the conduct of the carriers after approval of Agreement No. 8200. Carnation appeared but asked no monetary relief and hence none could be awarded since the proceeding was on the Commission's own motion. (Shipping Act § 22 (last paragraph), App. p. 13). The statement of the Court of Appeals of the effect of § 22 is not as full as it should be although it quotes § 22 in full in note 4.

12. On the motions to dismiss the undenied averments of the Complaint must be taken as true. (*Radovich v. National Football League*, 352 US 445, 448; *United States v. New Wrinkle, Inc.*, 342 US 371, 376; *Collins v. Hardyman*, 341 US 651, 652; *McCleneghan v. Union Stock Yards Co.*, 298 F 2d 659, 662 (Cir. 8)) and compare the Commission Report. See Part IX below.

If we labor the point unduly it is because it is believed, with deference, that the rule was ignored by the Court of Appeals; indeed that the Court of Appeals was persuaded to its conclusion, in part, because it had undertaken to pass on the facts and thought that they were other than as stated in undenied averments of the Complaint. (See R 184) We are not saying anything that has not been said to the Court of Appeals itself. (R 197-199)

13. Paragraph references are to the Complaint (R 9-25). And compare the Commission Report. See Part IX below.

fixing, by tariffs by and through said association and conference, the rates at which the members of said association and conference would serve said trade by transporation of commodities in said trade and commerce." Agreement No. 57 "provided *that PWC should fix the rates and issue a tariff thereof.*" The Agreement was filed with, and approved by, the United States Shipping Board under Shipping Act, 1916, § 15.[14] Thereafter those rates "were fixed by PWC[15] acting agreeably to and under said Agreement No. 57," except as stated below. Only carriers operating from Pacific Coast ports were members of PWC. (Par. 9) No carrier operating only from Pacific Coast ports was a member of the Far East Conference (FEC). (Par. 10)

Before January 1953 the carriers from the Atlantic and Gulf ports to the Far East formed the Far East Conference (FEC) for the purpose, among other things, of fixing rates to be charged by its members. Only carriers operating from Atlantic or Gulf ports were members of FEC. No carrier operating from only Atlantic and/or Gulf Ports was a member of PWC. (Par. 13) "[A]t no time was" FEC "lawfully authorized or empowered to fix any rates from Pacific Coast ports of the United States nor was it agreed that it should have any part in fixing said rates except as averred in paragraph 18 below" (the secret side agreement presently to be referred to) (par. 14).

Carriers operating from Atlantic or Gulf ports and Pacific ports were members of both Conferences. (Par. 9, 13)

Trade from the Atlantic and Gulf to the Far East was competitive with that from the Pacific Coast. PWC and FEC served

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14. From time to time different agencies, by statute or executive order, have been charged with administering the Act. The present agency is the Federal Maritime Commission. By the use of "Commission" we refer to it and its predecessors. The details of the changes are given in a note to 46 USCA § 1111 (main volume and pocket part). See *FMB v. Isbrandtsen Co.*, 356 US 481, 482 n. 1.

15. "Its business was and is, among other things, that * * * of fixing rates for such service by its members" (par. 12).

different trades that were competitive and their services were competitive except as restrained as stated below (Par. 16).

Under date of November 5, 1952 parties who were members of PWC, designating themselves as such, and parties who were members of FEC, designating themselves as such (R 50-59), entered into a written agreement known as Agreement No. 8200 (R 45-59), approved by the Federal Maritime Board on December 29, 1952 (R 18, 19, 45). It is of importance, particularly in the light of comments of the court below, to notice the precise terms of that agreement. It is in two parts, four paragraphs of recitals, numbered 1-4, and eight paragraphs of contractual terms, designated First through Eight. The recitals are important because they provide a dictionary of terms used in the other provisions.

Recital, par. 1, states that "Pacific Lines" are parties to "Federal Maritime Board Agreement No. 57, as amended, which designates the parties thereto as Pacific Westbound Conference" and says that

> "whenever reference is hereinafter made to action which is required or permitted to be taken by the Pacific Lines, such reference is intended to refer to action such as is required to effect the *establishment or change of rates pursuant to said Agreement No. 57,* as amended." (R 46)

Paragraph 2 identifies the "Atlantic/Gulf Lines" as parties to "Agreement No. 17, as amended, which designates the parties thereto as the Far East Conference" and recites that

> "whenever reference is hereafter made to action which is required or permitted to be taken by the Atlantic/Gulf Lines, such reference is intended to refer to action such as is required to effect *the establishment or change of rates pursuant to said Agreement No. 17,* as amended."

Language could not make it clearer that when "reference is hereinafter made to action which is required or permitted to be taken" by the conferences the reference is to action by the respective con-

ferences each acting separately under its own conference agreement.[16] There is nothing elsewhere in the agreement to the contrary.

Par. 4 recites that "the purpose which the parties desire to accomplish * * * is to assure * * * stability of ocean rates and frequency, regularity and dependability of service" and that to this end

> "it is essential that the parties [16] shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates". (R. 47)

Reading this with paragraphs 1 and 2 it means no more than it is desirable that "the parties shall, from time to time, establish the rates to be charged" by "action such as is required to effect the establishment or change of rates pursuant to" their said respective conference agreements, No. 57 and No. 17 (pars. 1 and 2). It is a recitation and *not a contractual provision.*

So far as we are concerned with them the contractual provisions then provide:

FIRST: After approval of the agreement the parties shall hold an "initial meeting" at a time specified. All matters coming before "the *initial* meeting" shall be determined only by a concurrence of the member lines, each "acting as a group * * * in accordance with the procedures prescribed by its respective Conference Agreement with respect to the establishment or change of rates.[16] The initial meeting shall make rules, *not inconsistent*

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16. Senate Report No. 860, Aug. 31, 1961 [To accompany H.R. 6775] considering the proposed 1961 amendments of Shipping Act, 1916 (2 U.S. Code Congressional and Administrative News, 87th Congress, First Session, 1961, p. 3108 at p. 3123) specifically noticing FMB No. 8200 said: "Under the Far East Conference/Pacific Westbound Conference joint agreement each conference retains the right of independent action." The Solicitor General, in his Memorandum herein for FMC, p. 2, likewise recognizes the reservation of right of independent action in Agreement No. 8200.

It is the "parties" who shall act, not some super-conference.

with the provisions of this agreement, for the conduct of all meetings to be held hereafter and for the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the *provision of machinery* for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting."

There is nothing here suggestive of a new super-rate-making conference. There is nothing here to suggest that as "to action which is required or permitted to be taken" by either conference, it is to be taken otherwise than by "action such as is required to affect the establishment of change of rates pursuant to" the respective conference agreements of each conference. The matter is taken beyond the realm of argument by the next provision of the agreement:

> "SECOND: Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of Lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by air mail, and a summary of the facts which justify the changes on said short notice. Forty-eight hours, or 72 hours, after the giving of such notice, dependent upon the medium by which such notice shall have been given, the notifying group may make such changes as stated in said notice and the other group may, at the end of 48 hours, or at the end of 72 hours, as the case may be, after the giving of such notice, make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or violation of this agreement. The parties shall, however, promptly give to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, copies of any notices and information with respect to any

changes in tariffs given or made as provided for in this Article SECOND."[16]

Nowhere is there a suggestion that the rate making functions conferred by Agreement No. 57 upon PWC, for its members, are taken away from that conference or that the independent action of PWC under its own conference agreement is subjected to the veto of the conference of the competitors of its members. Nowhere is there a suggestion of super-conference rates or tariffs. The tariffs contemplated are those of each conference. If they are to be changed they are to be changed by each conference, not by a super-conference, and notice to the other is necessary only in the case of "an *immediate* change".

In spite of the provisions of Agreements Nos. 57 and 8200 that PWC should be the rate fixing agency for its members and its tariffs the defendants, in January 1953, met at Santa Barbara, California, and "secretly and unlawfully associated themselves together and secretly and unlawfully combined, conspired and agreed to restrain commerce with foreign nations" and to fix the rates of members of PWC from Pacific Coast ports to the Far East, not as provided in Agreements No. 57 and 8200, and so conspiring agreed not to disclose to shippers information with respect to rate changes;[17] that defendants, and not PWC alone, should fix the rates for PWC members but that the rates so fixed should "then be given out and to shippers by defendant PWC falsely pretending to act as such and under Agreement No. 57";[17] that these rates would be adhered to and that PWC would make no change in

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17. The court below seemed to be mystified by these charges of secrecy but the parties had no trouble in recognizing that they were aimed at a possible statute of limitations question. (*Moviecolor Ltd. v. Eastman Kodak Co.,* 288 F2d 80 (Cir. 2), cert den. 368 US 821; *Westinghouse Electric Corp. v. Pacific Gas & Elec. Co.,* 326 F2d 575 (Cir. 9) an "electrical industry case" citing 4 earlier such cases by the Courts of Appeal for the 2nd, 7th, 8th, and 10th Circuits and noting the denials of certiori; *Westinghouse Elec. Corp. v. Burlington,* 326 F2d 691 (Cir. Dist. Col.);*General Electric Co. v. San Antonio,* 334 F2d 480 (Cir. 5))

any rate without the concurrence of FEC, except rates on a "list of initiative items" which did not include evaporated milk until May, 1961. (Par. 18, 19) This agreement and association, combination and conspiracy was never submitted to the Commission and was never approved (par. 20).

In 1951 PWC, the lawful rate fixing agency for rates for carriage by water from our Pacific Coast ports to the Far East, under Agreement No. 57, had fixed the rate for evaporated milk from Pacific Coast ports to the Philippine Islands. The defendants, under the secret and unapproved side agreement above stated, increased this rate by $2.50 per ton effective May 1, 1957. PWC, concealing this and pretending to act under Agreement No. 57, announced the increase and, over plaintiff's protest, put it into effect, as though it were an increase by PWC.[18] This rate was kept in effect until May 7, 1962. Meanwhile, in November 1957,

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18. The complaint alleged that the defendants, acting under the unapproved secret agreement "agreed that the rates * * * for evaporated milk should be increased by $2.50 per ton and that defendant PWC, pretending to act agreeably to the provisions of said Agreement No. 57, should state and circulate said increase" (par. 22) and that, in fact, it did so and in so doing defendants "falsely pretended that PWC was acting lawfully and agreeably to said Agreement No. 57" while in truth "defendants were acting agreeably and pursuant to said unlawful combination, conspiracy and agreement" (par. 23).

The significance of the way the parties acted has not escaped respondents. The FEC brief in opposition to the petition for certiorari, p. 4, states: "There is no assertion that the PWC rate which petitioner paid between May of 1957 and May of 1962 was not the rate set forth in the PWC tariffs". *That is correct.* That is where the rate was set forth. The ***defendants*** never purported to issue any rate or any joint rate ***under Agreement No. 8200.*** They never represented or asserted that they had any authority under Agreement No. 8200 to fix rates jointly, or that any rates fixed were joint rates or that any rates were established as the result of joint action under No. 8200. To the contrary, they always held themselves out as separate conferences of competing carriers each conference fixing its own conference rates for its members. It is too late for them now to claim that the actual way in which the rates were fixed was proper because authorized by No. 8200 or that they were acting under or within No. 8200. Cf. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 US 211, 215 where the impropriety of joint action was emphasized because "respondents hold themselves out as competitors".

plaintiff requested PWC to reduce the rate by $2.50 per ton to the rate it had established before May 1, 1957. PWC determined that the request should be granted[19] but would not reduce the rate without the concurrence of FEC. FEC declined concurrence[19] *and for that reason*[20] the rate was not, in fact, reduced until May 7, 1962, when the rate was reduced to the rate originally fixed by PWC. (Par. 21-28)

From May 1, 1957 through May 7, 1962 plaintiff was forced to ship its evaporated milk to Manila by members of PWC and to pay the increase in rate of $2.50 per ton. It did not pass this increase on and, as a result, suffered actual damage in the sum of $343,276.70. (Par. 29, 30)

In 1959 the Commission instituted an investigation into Agreement 8200 and conduct in relation to it. Carnation Co. intervened but, quite obviously, no issues here presented could be concluded there,—the Commission is given no power to adjudicate anti-trust questions as such,—Carnation did not ask for reparations and monetary relief could not be awarded (see note 11 above), much less any relief by way of treble damages. What general questions

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19. Respondents are not in the dark as to what was done. The FEC brief in opposition to the petition for certiorari, p. 4, states that "*PWC decided to reduce its evaporated milk rate* by $2.50 per ton. PWC requested the concurrence of FEC in said reduction. FEC declined concurrence."

20. The Complaint (par. 25) avers that "defendant PWC thereupon, and agreeably to the association, combination, conspiracy and agreement hereinabove averred in paragraph 18, withdrew its said request for concurrence and no reduction in said rates was made." It is further averred that PWC falsified in writing the reason for the denial of Carnation's request for a reduction when it "then knew, *and it was the fact*, that plaintiff's said request for reduction of rates, as aforesaid, was declined by reason of the refusal of defendant FEC to concur in the said reduction." (Par. 26, R 23) The Commission characterized the course of conduct as a sham (see App. p. 63).

In the face of these undenied averments it is very difficult to understand how the court below could have suggested that perhaps, as an isolated matter, and independently exercising its discretion, PWC was merely waiving its right to take independent action (R 184). We suggest, with deference, that the court was very hard put to justify its result.

the Commission may have gone into is not here a matte concern. The antitrust violation here complained of, price fix is a *per se* violation. Carnation is not concerned with, and not tendered, questions of discrimination, reasonableness or like. The Court of Appeals made some attempt to use the Ex iner's report in the Commission proceeding. In Part IX be we ask leave to call attention to the Commission Report, rend since preparation of this Brief began.

The claim presented by Petitioner Carnation is a very sir one. Before 1953, PWC, acting lawfully under Agreement 57 had established the lawful rates for carriage by water f Pacific Coast ports to the Far East. In 1952 PWC and entered into Agreement No 8200, approved under Shipping 1916, under which PWC "retained the right of indepen action" in fixing rates (note 16 above). But in January of 195 Santa Barbara, California, the defendants, Agreements No and No. 8200 to the contrary notwithstanding, secretly ag that these rates should not be so fixed by PWC but woul fixed by the defendants under their secret agreement. (R 19, As a result, and under this secret agreement, the lawful which PWC had fixed, and applicable to Petitioner's shipm was increased $2.50 per ton. This increase, an overcharge the rate lawfully fixed by PWC, was illegal because fixed suant to an agreement unlawful under the Sherman Act. tioner sues to recover this unlawful overcharge (trebled).

In the circumstances the relief awarded to shippers suin recover this overcharge could not vary,—it must be fixed at $ per ton. The recovery under Clayton Act § 4 could not pos interfere with the administration of any regulatory scheme u Shipping Act, 1916 any more that application for relief u that Act because it would be exactly the same as relief on a cation to the Commission for an order for reparation u Shipping Act, 1916 § 22 (the order as such is not enforcea and court award under § 30 (after jury trial and with an a

of a reasonable attorney's fee)[21] except that the compensatory aspect of the relief would be trebled.

The case presents no claim of "discrimination", "prejudice" undue or otherwise, "unfairness", "unreasonableness", "unjustness" or calling for the exercise of administrative expertise or discretion in application of any other standard, resolution of fact or framing of relief.

VII.

SUMMARY OF ARGUMENT

PWC was the authorized agency, under Shipping Act, 1916, for fixing rates for common carriage by water from Pacific Coast ports of the United States to Manila. It had properly established such rates. Thereafter, pursuant to an agreement between it and its members and others, unapproved under Shipping Act, 1916, § 15, and hence not exempted from application of the antitrust statutes by the exempting provision of Shipping Act, 1916, the rate on evaporated milk was increased $2.50 per ton. Petitioner, as a shipper of evaporated milk from Pacific Coast ports to Manila was forced to pay the increased rate. In the circumstances, if the antitrust statutes stood alone, under Clayton Act, § 4, it was entitled to sue and recover three-fold damages. (Pp. 6 above, 27 ff below)

It is said that this action cannot be maintained, however, because of Shipping Act, 1916, at least in advance of determination by Federal Maritime Commission of various issues involved (just what is not clear) favorably to petitioner. There is thus presented a question of accommodation of the underlying policy and terms of the antitrust statutes with the terms and policy of Shipping Act, 1916, relating to common carriage by water in foreign commerce and of accommodation of the proper function of the courts, upon the one hand, with those of the Commission upon the other, where possible Shipping Act questions are involved. For the resolution of these questions the basic materials are the terms

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21. See pp. 38, 56-59 below.

and policies of the statutes. (P. 2 above, p. 26ff below, p. 48ff below.)

The Sherman Act provisions, §§ 1 and 2, prohibiting combinations in restraint of trade and monopoly or attempts to monopolize, are statements of "broad anti-trust policies" resting on the premise that unrestricted interaction of competitive forces yields the best allocation of our economic resources and are aimed at preserving free and unfettered competition as the rule of trade as opposed to the alternatives of cartelization or governmental regulation. The underlying policy gives the provisions such force that immunity is not ~~likely~~ lightly implied. Civil and criminal sanctions are imposed. Not the least of these is the provision of Clayton Act, § 4, that any person injured in his business or property by reason of anything forbidden in the antitrust laws may sue and recover threefold the damages sustained. This provision is designed not merely to provide compensation for damages suffered but is designed to reinforce the broad social object of the Sherman Act by imposing punishment for unlawful conduct and by supplementing government enforcement of the antitrust laws by calling out private litigants as additional enforcement agencies. Action for treble damages under Clayton Act § 4 is not to be looked upon, therefore, as an ordinary piece of civil litigation for damages. Upon the other hand, Clayton Act § 4 does provide for an action to compensate those injured by Sherman Act violations and the full measure of recovery to which the plaintiff is entitled under the statute is the damages he has suffered, trebled. (Pp. 27-32.) This is relief that cannot be had under the Shipping Act, 1916.

In the background of Shipping Act, 1916, were threats to common carriers by water posed by antitrust litigation and the existence of industry abuses. As a result, the statute was adopted prohibiting certain abuses, specifying a limited number of standards of conduct in areas other than rate fixing, providing for administration of the statute by an agency but deliberately staying away from rate fixing or giving that agency power to fix rates

and, as the central scheme of regulation, providing for industry self-regulation through agreements submitted to and approved by the administrative agency and expressly exempting from operation of the antitrust statutes agreements and arrangements so approved. (P. 33 ff.) The scheme for common carriage by water in *foreign* commerce is in sharp contrast with the detailed and all-pervasive statutory scheme of regulation for common carriage by water in *interstate* commerce finally spelled out for interstate commerce in Part III of the Interstate Commerce Act (Transportation Act of 1940). Particularly the absence by design of rate regulation under Shipping Act, 1916, by force of the statute itself or by the Commission, is in marked contrast with the very full provision for rate regulation of interstate common carriage by water in Part III of the Interstate Commerce Act, modeled after the earlier provisions in Part I regulating carriers by railroad. (Pp. 33-48.)

Congress made no attempt to accommodate the anti-trust statutes and the Shipping Act, 1916, by expressly providing for *pro tanto* repeal ~~of~~ in the Shipping Act or by general excepting provisions in the Shipping Act. Nor is the case a proper one for the courts to attempt such an accommodation by resorting to the doctrine of implied repeal. Effect should be given, if possible, to both statutes and there is no such positive repugnancy between the two that application of the earlier antitrust statutes would render the provisions of the Shipping Act nugatory. The proposition is well supported by the decisions of this court which, repeatedly, have been called upon to consider the matter of accommodation of the antitrust statutes with industry regulatory statutes. (Pp. 48-62 below.) To the contrary, Congress provided a method of accommodation of the antitrust statutes with the Shipping Act on a case by case basis by providing, § 15 of the Shipping Act, that agreements under that section presented to, and approved by the Commission, were exempted from the provisions of the antitrust statutes. It thus provided for a method of accommodation that should be made not in the abstract and in general but in the light

of the specifics of the precise problem presented and provided machinery by which that accommodation could be adjusted and fitted so as to reconcile, in terms of concrete problems, the operation of the schemes of the antitrust statutes and the industry regulatory statute. Where this method of accommodation is appealed to, and approval is given, the matter approved is exempted from operation of the antitrust statutes. But where Congress has thus expressed the method of exemption from the antitrust statutes exemption can be obtained only in this way and when it is not so obtained the antitrust statutes apply. This rule, and the leading decision announcing it, *United States v. Borden Co.,* 308 US 188, control here. (See pp. 62-67, below.)

It is argued, however, that even if the statutes can be reconciled nevertheless given conduct may fall under both and, this being the situation here, the questions which are raised, upon a proper division of functions between Commission and courts, should first be submitted to the Commission for decision and, until it has acted, no action can be maintained in a District Court. The doctrine appealed to is the so-called primary jurisdiction doctrine designed to accommodate the complimentary roles of courts and administrative agencies and to permit the administrative agency to act in the first instance when this is necessary for the protection of the integrity of the industry regulatory scheme and where the questions involved call for the employment of the special competency of the administrative agency. But that doctrine is to be applied only where the circumstances provide the reasons which gave birth to, have shaped the course of development of, and continue to support, the primary jurisdiction doctrine. Where, as here, the questions of fact are only those usual, and familiar to courts, in antitrust litigation, the principal question presented is a question of law and relief by a money award under Clayton Act § 4 will no more disturb the operation of the regulatory scheme of the Shipping Act than would a money award under §§ 22 and 30 of the Shipping Act itself, there is no room for operation of the

primary jurisdiction doctrine and courts should proceed to perform their proper functions by entertaining proceedings under Clayton Act § 4 to the end that antitrust policy, whose enforcement Congress has entrusted to the courts, is not, in practical effect, taken over by an administrative agency. (Pp. 67-80 below.)

To support the argument that dismissal of this Clayton Act § 4 action was proper *U. S. Navigation Co. v. Cunard SS Co.,* 284 US 474 and *Far East Conference v. United States,* 342 US 570 are relied upon. When those cases are read with the other primary jurisdiction cases and are read particularly with *Federal Maritime Board v. Isbrandtsen Co.,* 356 US 481 and *Pan American World Airways v. United States,* 371 US 296, it is apparent that to the extent they may have any vitality it is confined to support of the proposition that an application to courts for *injunctive* relief, with prospective operation *in specie,* which can well interfere with the proper operation of an industry regulatory statute and the functions of an administrative agency under it, will not be granted in advance of administrative action; that these cases will not support application of the primary jurisdiction doctrine when the sole issue is that of compensation for injury from past wrongdoing or punishment for past criminal conduct. (Pp. 80-92 below.) To the contrary, the decisions which are controlling here are *United States v. Borden Co.,* 308 US 188 and *Great Northern R. Co. v. Merchants Elevator Co.,* 259 US 285, holding that where Congress has stated the test for exemption from the antitrust statutes and it has not been met, where there are no questions of fact peculiar to the industry, requiring for their resolution special competency and special knowledge of the industry, and where the ultimate result does not call for the exercise of administrative discretion but is to be determined by the application of a rule of law, immediate functioning of the courts is not to be delayed by resort to an administrative agency; there is no proper room for operation of the primary jurisdiction doctrine. (Pp. 92-95 below.)

The court below was in error in dismissing the action when it presented no matter upon which administrative action could be determinative and where the court alone, under Clayton Act § 4, could give the full measure of relief (treble damages) to which the petitioner was entitled.

VIII.

ARGUMENT

Carriers by water so combined to raise the rates Petitioner was required to pay that Petitioner, without question, could have relief under the antitrust statutes if their's were the only voice that spoke (p. 6, above). But it is urged that for carriage by water in foreign commerce the Shipping Act, 1916, has set up a scheme of regulation and that, though that statute has provided its own test as to when carrier's agreements shall be excepted from operation of the antitrust statutes (by Commission approval), still, even when this test cannot be met, carrier conduct is exempted from application of the antitrust statutes, and remedies that they provide are not available, because the scheme of the antitrust statutes cannot operate in an atmosphere where, by another statute, there is an industry regulatory scheme. So the question for decision is, are these two statutory programs such that, in this case, each can have its own field of play, under the test Congress has provided, or is the scheme of regulation of the Shipping Act, 1916, so complete that even though its expressed method for eliminating operation of the antitrust statutes has not been appealed to still operation of the antitrust statutes is excluded? Congress has said how operation of the antitrust statutes can be avoided in the industry to which the Shipping Act, 1916, applies. (Pp. 37, 62 ff.) Can the courts say that this was a waste of breath because the antitrust statutes could not apply anyway? Does one statute give way to the other, in whole or in part, or has Congress provided the method of reconciliation so that both can apply in full force in a case such as this except only that a private suitor can not elect more than one remedy and can not have more than a single satisfaction of his rights?

It is a self-evident truism that for the solution of this problem of accommodation the materials are the statutes and the nature and force of the policies underlying them.

A. The Antitrust Laws and Their Policy

The terms and policy of the antitrust laws, so far as material here, are comparatively easy of statement.

Sherman Act § 1 makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations". (Under this provision price fixing arrangements, including those of regulated common carriers, are illegal *per se* (p. 6 above).) Sherman Act § 2 makes everyone "who shall monopolize, or attempt to monopolize, or combine or conspire * * * to monopolize" interstate or foreign trade or commerce guilty of a misdemeanor.

Northern Pac. R. Co. v. United States, 356 US 1, 4, shortly and sweepingly stated the policy of the Sherman Act:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestricted interaction of competitive forces would yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even where that premise is open to question, the policy unequivocally laid down by the Act is competition."[22]

These statutes represent the statement of "broad anti-trust policies laid down by Congress" (*United States v. DuPont de*

22. *U. S. v. Philadelphia Nat. Bk.*, 374 US 321, after quoting *California v. Fed. Power Com'n*, 369 US 482, 485 for the proposition that "[i]mmunity from the antitrust laws is not lightly implied" adds "This canon of construction which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here."

Nemours & Co., 353 US 586, 590; cf *Allen Bradley* in note 23 below) and

> "Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regulation of large portions of the economy." (*United States v. Philadelphia Nat. Bk.,* 374 US 321, 372).

The underlying policy gives the statute such force that "immunity from the antitrust laws is not lightly implied"[23] and agreeably to this precept this Court has said that its "function is to see that the policy entrusted to the courts is not frustrated by an administrative agency." (*California v. Fed. P. Com'n,* 369 US 482, 485, 490[24])

In a somewhat different context *The American Ship Building Co. v. N.L.R.B.,* 379 US 814 repeated that exercise of the judicial function properly must be employed:

> "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

Congress has not left the provisions of the Sherman Act as lifeless monuments to pious solicitude and hope. It has provided

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23. *U. S. v. Philadelphia Nat. Bk.,* 374 US 321, quoting this statement (see note 22 above), said that "[i]t is settled law". *Allen Bradley Co. v. Local Union No. 3,* 325 US 797, 809, referring to the antitrust statutes, and holding the union exemption did not apply, points out: "It must be remembered that the exemptions granted to the unions were special exceptions to a general legislative plan."

24. Immunity is "not lightly to be inferred from the enactment of a regulatory statute" (*Trans World Airlines, Inc. v. Hughes,* 332 F.2d 602, 606 (Cir. 2), cert. granted and then dismissed as improvidently granted 380 US 248). Compare holding that courts should not shirk the performance of their own functions by referrals, *Southwestern S. & P. Co. v. River Terminal Corp.,* 360 US 411, 414; *New York, Susquehanna etc. Co. v. Follmer,* 254 F.2d 510 (Cir. 3) calling attention to the canon of judicial function expressed in *La Buy v. Howes Leather Co.,* 352 US 249. Cf. *Packaged Programs Inc. v. Westinghouse Broadcasting Co.,* 255 F 2d 708 (Cir. 3).

sanctions to make the Act a viable and impelling standard of business conduct. Violations are made crimes (§§ 1 and 2 (15 USC §§ 1, 2)) and may result in forfeiture of property (§ 6, 15 USC § 6). Through the intervention of the Department of Justice the processes of courts of equity are to be invoked to compel compliance (§§ 4, 5, 15 USC §§ 4, 5). The Government can sue for compensation when violations hurt it in the conduct of its own affairs (Clayton Act § 4A, Act of July 7, 1955, c. 283, § 1, 69 Stat. 282, 15 USC §§ 15a and compare Clayton Act § 11, 15 USC § 21). Private litigants can have the help of equity (Clayton Act § 17, 15 USC § 26). More important for this case, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained". (Clayton Act § 4, 15 USC §15)

This Clayton Act § 4 private right of action for treble damages is more than a provision for compensation for damage suffered by a private suitor. It has a large role of support of the underlying policy of the Sherman Act.

The "punitive two-thirds portion of a treble-damage antitrust recovery" is "extracted from the wrongdoers as *punishment* for unlawful conduct" (*Commissioner v. Glenshaw Glass Co.*, 348 US 426, 427, 431).[25] "The treble-damage action was intended *not* merely to redress injury to an individual through the prohibited practices, *but to aid in achieving the broad social object of the statute.*" (*Karseal Corp. v. Richfield Oil Corp.*, 221 F2d 358, 365 (Cir. 9)[26]) It does more than merely provide an added sanction

25. Cf. *Powell v. St. Louis Dairy Co.*, 276 F2d 464 (Cir. 8); *No. Carolina Theatres, Inc. v. Thompson*, 277 F2d 673 (Cir. 4).

26. The case was quoting *Fanchon & Marco v. Paramount Pictures*, 100 F Supp 84, 88, (S.D. Cal.) aff'd 215 F2d 167 (Cir. 9), c.d. 348 US 912. *Karseal* further said that "The Clayton Act was part of the overall plan and the 'right of the injured party to recover damages *was intended to provoke greater respect for the Act* * * *', Maltz v. Sax, 7 Cir., 1943, 134 Fed. 2d 2, 5, cert. den. 319 US 772". See the very strong opinion in

imposed on the violator. It calls out a new and different legion of enforcement agencies.[27] The Clayton Act remedy *"supplements Government enforcement of the antitrust laws."* (*U. S. v. Borden Co.*, 347 US 514, 518) The idea has also been expressed by this Court in *Lawlor v. National Screen Service Corp.*, 349 US 322, 329 and *Bruce's Juices v. American Can Co.*, 330 US 743,[28] and

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Monarch L. Ins. Co. v. Loyal etc. Co., 326 F2d 841 (Cir. 2), c.d. 376 US 952, quoting *Karseal. Mach-Tronics, Inc. v. Zirpoli*, 316 F2d 820, 824 (Cir. 9) also quoted *Karseal* and *Flintkote* and stated: "The provision for the recovery of treble damages by an injured party was an *important and significant feature of the entire antitrust program.*"

Monarch L. Ins. Co., above, is of more than usual interest because of the question presented which was one of adjustment of Sherman and Clayton Acts to state statutes regulating the insurance business in view of McCarran Act § 3(b), 15 U.S.C. § 1013 and repeal of Sherman Act § 7.

Flintkote Co. v. Lysfjord, 246 F2d 368, 398 (Cir. 9), c.d. 355 US 835 said: "Further, a niggardly construction of the treble damage provisions would do violence to the clear intent of Congress. The private antitrust action is an important and effective method of combatting unlawful and restructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction." See also *Olympic Ref. Co. v. Carter*, 332 F2d 260, 264 (Cir. 9), c.d. 279 US 900.

Weinberg v. Sinclair Refining Co., 48 F Supp 203, 205 (E.D. N.Y.) and *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F Supp 796, 801 (S.D. Cal.) both refer to the treble-damage action as supplying "an ancillary force of private investigators to supplement the Department of Justice in law enforcement."

27. "The grant of a claim for treble damages to the person injured was for the purpose of *multiplying the agencies which would help enforce the antitrust laws* and therefore make them more effective." (*Kinnear-Weed Corp. v. Humble etc. Co.*, 214 F2d 891, 893 (Cir. 5), c.d. 348 US 912). Compare the colorful expression of the idea in *New Jersey Wood. F. Co. v. Minneapolis M. & Mfg. Co.*, 332 F2d 346, 350 and the quotation, by this Court, on its review in that case, ... US ......, Oct. Term 1964 No. 291, May 24, 1965 of language from *Bruce's Juices*, note 28 below. *Kinnear-Weed* is quoted in *Osborn v. Sinclair Ref. Co.*, 324 F2d 566, 572 (Cir. 4). See material in note 26 above and 28 below.

28. *Lawlor v. Nat. Screen Serv. Corp.*, 349 US 322, 329, speaks of "the *public interest in* vigilant enforcement of the antitrust laws *through the instrumentality of the private treble-damage action.*"

Bruce's Juices v. American Can Co., 330 US 743, 751, speaking of treble-damage actions in connection with violations of antitrust statutes,

more recently it has said that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." (*Minnesota Mining & Mfg. Co. v. New Jersey Wood Furnishing Co.*, ... US ......, 14 L.ed 2d 405, 85 S.Ct. 1473, 1477, Oct. Term 1964 No. 291, May 24, 1965[29]) To look upon the question here presented as merely whether a claimant should seek a compensatory award under this Act or under the Shipping Act misses entirely this consideration of underlying policy and purpose.

Still the private recovery has its other side. Under the antitrust statutes, once a case of damage is made, the trebling of the amount found follows "automatically" (*Clark Oil Co. v. Phillips Pet. Co.*, 148 F2d 580, 582 (Cir. 8), c.d. 326 US 734. cf. *Trans World Airlines, Inc. v. Hughes*, quoted in note 30 below). "In this respect

said that such an action "stimulates one set of private interests to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the government of cost of enforcement. * * * It is clear Congress intended to use private self-interests as a means of enforcement and to arm injured persons with private means to retribution when it gave to an injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee."

29. No more is required in justification of the belief of Congress than the examples to be found of the development of antitrust policy and doctrine in the decisions of this Court in private antitrust damage suits, initiated and carried through by private litigants, without prior Government action in the particular area or with regard for the particular question involved. See *W. W. Montague & Co. v. Lowry*, 193 US 38; *Thomsen v. Cayser*, 243 US 66; *Ramsay Co. v. Associated Billposters*, 260 US 501; *Binderup v. Pathe Exchange*, 263 US 291; *Story Parchment Co. v. Paterson P. P. Co.* 282 US 555; *Mandeville Island Farms v. American C. S. Co.*, 334 US 219; *Moore v. Mead's Fine Bread*, 348 US 115; *Radovich v. National Football League*, 352 US 445; *Safeway Stores, Inc. v. Vance*, 355 US 389; *Nashville Milk Co. v. Carnation Co.*, 355 US 373; *Klor's v. Broadway-Hale Stores*, 359 US 207; *Radiant Burners v. Peoples Gas etc. Co.*, 364 US 656; *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 US 690; *Silver v. New York Stock Exchange*, 373 US 341; *Simpson v. Union Oil Co.*, 377 US 13; *United Mine Workers v. Pennington*, 381 US 657, 14 L.ed. 2d 626 (Oct. Term 1964 No. 48, June 7, 1965). Cf. *Allen Bradley Co. v. Local Union No. 3 etc.*, 325 US 797 and *Dr. Miles Medical Co. v. Park & Sons*, 220 US 373.

neither the jury nor either court had any discretion." (*Bigelow v. R. K. O. Radio Pictures*, 150 F2d 877, 883 (Cir. 7), rev. on other grounds.) By consequence, and *Flintkote Co. v. Lysfjord*, 246 F2d 368, 397 ff (Cir. 9), c.d. 355 US 835, cited in note 26, so holds, if plaintiff receives anything less than his damages *trebled* he does not receive "full satisfaction of his claim"; full damages trebled, as to plaintiffs, is the "whole to which they are entitled".[30] This is pointed out because the Court of Appeals seemed to think Shipping Act § 22 bolstered the Court's holding for the reason that, so the Court thought, under § 22 the Commission could "award full reparations". It could not award the treble damages to which petitioner is entitled under the Clayton Act. (Cf. *Trans World Airlines, Inc. v. Hughes*, last paragraph of note 30.)

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30. Three cases dealing with a parallel problem, the extent to which jurisdiction of state courts to deal with disputes arising out of labor relations survives the federal legislation dealing with labor relations, are significant.

> *United Construction Workers etc. v. Leburnum Const. Corp.*, 347 US 656;
> *International Association etc. v. Gonzales*, 356 US 617; and
> *International Union etc. v. Russell*, 356 US 634.

Their significance is the importance they attach to the circumstance that the plaintiff could get *full recovery* (including *punitive* damages) only in the state courts, as a basis for holding that the state courts were not ousted of jurisdiction because the conduct complained of was an unfair labor practice.

In *Russell* the court said:

> "Punitive damages constitute a well-settled form of relief under the law of Alabama when there is a willful and malicious wrong. To the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts. The power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board. In *Laburnum* we approved a judgment that included $100,000.00 in punitive damages."

Gonzales, above, noticed that the NLRB could not have made an award "for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered".

Compare *Trans World Airlines, Inc. v. Hughes*, 332 F2d 602, 609 (Cir. 2), cert. gr. and then dismissed as improvidently granted 380 US 248, considering the Aviation Act and saying: "Moreover, the Act fails to empower the Board to grant the very relief principally sought by the plaintiff in this action—the award of money damages, treble under the mandate of the antitrust laws."

B. Shipping Act, 1916 and Foreign Commerce

In 1932 *United States Navigation Co. v. Cunard S. S. Co.,* 284 US 474, 480 said: "The Shipping Act is a comprehensive measure bearing a relation to common carriage by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." To the extent that the remark may have been justified in 1932 by the Shipping Act's regulation of *interstate* commerce it has been drained of significance by Part III of the Interstate Commerce Act, p. 45ff below. If, as to common carriage by water in *foreign* commerce, the remark means no more than that the Shipping Act, 1916 was the industry regulating statute in the generic sense in which the Interstate Commerce Act was the industry regulating statute for common carriage by land (then by railroad), the SEA is the regulatory statute for the securities business, etc. it is correct but only states the obvious and is not meaningful. If there is attempted to be read into the remark that the Shipping Act, 1916, *by its own provisions,* supplied for common carriage by water in *foreign* commerce the detailed and pervasive regulation and control that the Interstate Commerce Act provided for railroads, the attempt must fail in light of the different provisions of the two Acts and the recognition by Congress of this vast difference by removing, in 1940, regulation of *interstate* carriage by water from Shipping Act, 1916 to Part III of the Interstate Commerce Act (modeled after Part I, railroads) under the administration of the Interstate Commerce Commission, (see below p. 45ff).

The background, history and principal provisions of the Shipping Act, 1916, are reviewed in *Federal Maritime Board v. Isbrandtsen Co.,* 356 US 481. It demonstrates that from the beginning Congress was aware of, and was dealing with, questions raised by the antitrust statutes. It had "long been almost universal practice for American and foreign" carriers to operate under "conference arrangements and agreements". By 1913 "it was

recognized that such agreements might run counter to the policy of the antitrust laws" (p. 487). The House, through its Alexander Committee "undertook an exhaustive inquiry" which "brought to light a number of predatory practices by shipping conferences designed to give the conferences monopolies". The result was enactment of Shipping Act, 1916. *Isbrandtsen Co.,* above, very shortly states its essence:

> "The Act does not forbid shipping conferences in foreign commerce but requires all conference agreements covering the subjects mentioned in § 15 to be submitted for Board approval. *No power to fix rates is granted to the Board.* Subject to familiar limitations, the power vested in the Board is to approve agreements not found to be unjustly or unfairly discriminatory in violation of §§ 16 and 17 or otherwise in violation of the Act. *Approved agreements are exempted from the antitrust laws.*" (P. 490)

The Shipping Act, 1916, as originally adopted had 3 principal features, (a) limited provisions regulating the industry by setting up broad standards of fair dealings and prohibiting a few of the more flagrant forms of unfair practice aimed at elimination of competition, (b) a provision for industry self-regulation by agreements when approved by the Commission and exempting such agreements from the operation of the antitrust statutes *when approved by the administrative agency* (§ 15) and (c) the creation of an agency to administer the statute and provision of some remedies.

In respect of the first of these 3 features, a matter of significance in this case, *Congress sharply distinguished between interstate and foreign commerce.* "The regulation of water carriers in the *foreign* trade of the United States is substantially different from the regulation of carriers in our *domestic* trades." (*Empire State etc. Ass'n v. FMB,* 291 F2d 336, 341 (Cir. Dist. Col.), c.d. 368 US 931.) The difference will become more apparent when the regulation of domestic carriage by water is reviewed. (See Part VIII-C, below.) For our purpose, the principal distinction is that

with respect to *foreign* commerce (unlike *interstate* commerce) the statute did not itself undertake direct regulation of rates nor confer upon the agency charged with administration of the statute power to fix rates in *foreign* commerce.[31]

The differentiation between *foreign* and *interstate* carriage starts with the first section (App. p. 2). It defines a "common carrier by water in *foreign* commerce" as one transporting between the United States and a foreign country, and one "in *interstate* commerce" as carrying between ports in the United States.

The provisions of the statute applying to *foreign* commerce, because they apply to *all* common carriers, are susceptible of summary statement.[32]

In its first aspect, direct statutory control: The statute forbids paying or allowing "deferred rebates" (§ 14 First) and the use of "fighting ships" (§ 14 Second), has a series of provisions designed to prevent preferences and discrimination[33] and requires that there be established and observed "just and reasonable regulations and practices" relating to the handling of property (§ 17). It contains only 2 provisions dealing expressly with rates: (a) no common carrier by water in foreign commerce shall demand or collect any rate which "is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States" (§ 17) and (b) obtaining carrier service at less than the regular

31. And see *Isbrandtsen Co.*, 356 US 481 quoted at p. 34 above.

32. Compare the summary statement in *Fed. Maritime Board v. Isbrandtsen Co.*, 356 US 481, 490ff.

33. § 14 prohibits retaliation against any shipper by refusing space or by other discriminating or unfair methods because the shipper patronized another carrier or filed a complaint or for any other reason, and prohibits discriminatory contracts based on volume of freight and unfair treatment or discrimination in the matter of space or other facilities, handling freight in proper condition or in the adjustment and settlement of claims. § 16 First makes it unlawful to give any undue or unreasonable preference to any person, locality or description of traffic or to subject any person, locality or description of traffic to unreasonable prejudice or disadvantage and § 16 Third makes it unlawful to induce, etc. any insurance company, etc. not to give a competitor as favorable rate of insurance on vessel or cargo as is granted to another.

rate by fraudulent means[34] or by "any other unjust or unfair device or means" is prohibited (§ 16 and § 16 Second). Power to disapprove rates, much less than to fix them, is conspicuously absent. (See *Isbrandtsen Co.,* quoted at p. 34 above.)

The second aspect of the statute, here of direct concern, is the provisions dealing with conference agreements and industry self-regulation under approved agreements, found in § 15:

> "Every common carrier by water * * * shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier * * * to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; * * *.[35]
>
> "The Commission may * * * disapprove, cancel or modify any agreement * * * that it finds to be unjustly discriminatory or unfair * * * or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.
>
> "* * * It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.
>
> "All agreements, modifications or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation."

Up to this point § 15 contemplates approved agreements regulating industry practices and placing restraints on competition. These provisions, and the policy they represent, are not completely harmonious, to say the least, with the provisions and the policies of the antitrust statutes. The question of application of the anti-

34. As "by means of false billing, false classification, false weighing, false report of weight" etc.

35. Other subjects of agreement which might fall under the antitrust laws are here specified such as agreements giving special privileges, regulating competition, pooling agreements, allocating ports etc., etc.

trust statutes to carriage by water lay at the threshold of Congressional inquiry into the whole subject. (See *Isbrandtsen Co.*, p. 34 above.) Some form of accommodation between the Shipping Act and the policy it represents and the antitrust statutes and the policy they represent was called for. *Congress did not leave either the accommodation, or the way it should be worked out, to chance.* To the contrary, § 15 expressly provides for the method and extent of accommodation, for the section goes on:

> "Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."[36]

This is the only provision which suggests that the Commission can deal with antitrust questions as such. The language that approval *excepts* from the antitrust laws *indicates that Congress contemplated that the antitrust laws remained fully operative unless an exception were granted as provided in the statute.* There would be no occasion to provide for "exception" from the antitrust statutes if other provisions of the Shipping Act superseded or repealed them, expressly or by implication.

The other provisions of the Act deal with the agency created to administer the Act. It is provided by § 22 that the Commission, either upon complaint filed with it, or on its own motion, shall investigate to determine whether there have been any violations of the Act and, in a proper case, "may direct the payment * * * of full reparation" except that it cannot, *in a proceeding on its own motion* make an order for the payment of money. This last is a curious provision if Congress contemplated that one injured by violation of the Act had his only remedy under the Act and was not free to seek redress elsewhere if, the Act aside, he had a right to do so. Congress did not think so and it denied the Commission power to force this result.

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36. Quoted from 46 USC § 814. These sections of Title 15 USC include the antitrust statutes, Sherman Act §§ 1, 2 and others and Clayton Act § 4.

The orders of the Commission are not self-executing and the Commission has no powers of enforcement. In case of an order "*other than* an order for the payment of *money*" on application to a district court, if "the court determines that the order was regularly made and duly issued, it shall *enforce obedience* thereto by writ of injunction or other proper process, mandatory or otherwise." (§ 29) In case of such orders there is no further trial of the merits of the controversy. The only open question is whether "the order was regularly made and duly issued". But there is no direct enforcement of an order *for* the payment of *money.* If such an order is not complied with "the person to whom such award was made may file in the district court * * * a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises", in such suit "the findings and order * * * shall be prima facie evidence of the facts therein stated" and if the petitioner prevails "he shall be allowed a reasonable attorney's fee". (§ 30) Here there is no direct enforcement of the order. There is a trial *de novo*[37] and, upon such trial, the parties are entitled to trial by jury.[38] (See also p. 56ff below.)

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37. *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, 724 (Cir. 3, rev. on other grounds, 238 US 473) under the parallel provision of the Interstate Commerce Act, § 16(2) as amended in 1889 and the prototype of Shipping Act, 1916, § 30, pointed out that the action "is not a suit *on* the award. *qua* award, * * * but a *plenary suit for damages* actually incurred". *Missouri Pac. Ry. Co. v. V. C. E. Ferguson Sawmill Co.*, 235 Fed. 474, 478 (Cir. 8), under the parallel provision of the Interstate Commerce Act, citing *Western N. Y. etc. R. Co.*, note 38 below, specifically holds that evidence may be introduced in addition to that introduced before the Commission. *United States v. I.C.C.*, 337 US 426, 445, quoting *Meeker v. Lehigh Valley R. Co.*, 236 US 412, 430 said of ICA § 16(2) that it "only establishes a rebuttal presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury." See also *Willamette Iron etc. Works v. Baltimore & O. R., Co.*, 25 F2d 521 (D. Ore.).

38. *Western etc. R. Co. v. Penn. Ref. Co.*, 137 Fed 343, 349 (Cir. 3), aff'd 208 US 208, under the Interstate Commerce Act; *Lehigh Valley R. Co. v. Clark*, note 37 above.

"In suits at common law, where the value in controversy shall exceed

A final comment is in order because of suggestions that have been made in the past. It is entirely appropriate that the Shipping Act, 1916, should spell out its own penalties and provide remedies even if the antitrust statutes apply to the non-approved agreements which fall within the antitrust statutes. The reason is very simple. The coverage of Shipping Act, 1916 and the antitrust statutes is not co-extensive. Conduct may offend the Shipping Act, 1916, which does not offend any of the antitrust statutes.[39]

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twenty dollars, the right of trial by jury shall be preserved, * * *." (U.S. Const., Amend. VII)

As to Federally created rights the Seventh Amendment necessarily applies to rights created by statute since there is no Federal common law. (*Erie R. Co. v. Tompkins,* 304 US 64) Whether an action to vindicate a Federally created right is one at common law within the Seventh Amendment depends on the nature of the claim. It is "at common law" even though bottomed on a Federal statute if the action is simply one for money damages (*Fleitmann v. Welspach Street Lighting Co.,* 240 US 27; *Mercoid Corp. v. Mid-Continent Inv. Co.,* 320 US 661, 671; *Beacon Theatres v. Westover,* 359 US 500).

Compare other types of actions brought for money awards which are of such character that the plaintiff is entitled to have his right to damages determined by a jury: *Dairy Queen v. Wood,* 369 US 469 (trade-mark infringement), citing *Bruckman v. Hollzer,* 152 F2d 730 (Cir. 9), (copyright infringement); *Hansen v. Safeway Stores,* 238 F2d 336 (Cir. 9) (patent infringement); *Schulz v. Penn. R. Co.,* 350 US 523, (an action under the Jones Act); and the following cases under the antitrust statutes: *Beacon Threatres, Inc. v. Westover,* 359 US 500, relying on *Fleitmann v. Welspach Street Lighting Co.,* 240 US 27; *Marks Food Corp. v. Barbara Ann Baking Co.,* 274 Fed 934 (Cir. 9); *Siegfried v. Kansas City Stock Co.,* 298 F2d 1, 5 (Cir. 8), c.d. 369 US 819.

39. Shipping Act § 15 is *both* broader and narrower than the Sherman Act. It is broader in that the Sherman Act deals only with conduct "*in restraint of trade or commerce* among the several States, or with foreign nations" while § 15 of the Shipping Act applies to *every* agreement enumerated whether "in restraint of trade or commerce" or not, i.e., unapproved agreements violate § 15 although not in restraint of trade or a violation of the Sherman Act. Upon the other hand § 15 is narrower than the Sherman Act in that it deals only with *agreements* and then *only* with agreements *between carriers and other persons subject to the Act* (see § 1, App. p. 2). It does not cover, for example, an agreement between a carrier and a shipper, although this might be in restraint of trade. The antitrust statutes are not limited by the character of the persons entering into a forbidden agreement. They also reach conduct which is without agreement and conduct of a single person.

Congress was satisfied to let regulation of carriage by water in foreign commerce rest in this posture until further inquiry, resulting in the amendments of 1961, was triggered by this Court's decision in *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481. This was the third decision in this Court dealing with the long series of controversies arising out of the dual-rate system employed by some conferences of carriers by water in foreign commerce. Two attacks on this system had come here from litigation commenced in district courts. In *United States Navigation Co. v. Cunard S. S. Co.*, 284 US 474, an action by a private litigant, and in *Far East Conference v. United States*, 342 US 470, and action by the United States, this Court had held that the action *seeking injunctive relief* could not be entertained in advance of action by the Commission. Then, in *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481, decided in 1958, this Court held that a dual-rate system, approved by the Commission, was illegal as matter of law as in violation of the Shipping Act and affirmed a decision of the Court of Appeals for the District of Columbia Circuit setting aside the Commission's order. This decision, at least in the opinion of many, to borrow language from Senate Report No. 860 on the proposed 1961 amendments (see note 16 above), "cast substantial doubt on the legality of the thousands of dual-rate contracts then being used by more than half the 113 inbound and outbound conferences serving U. S. ports. * * * Therefore, the situation was ripe for moratorium legislation." Congress

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The Shipping Act is comprehensive as to *agreements* between a limited class of persons. The Sherman Act is comprehensive as to parties with respect to a limited type of agreement.

Contracts which, if unfiled and unapproved, violate § 15 of the Shipping Act but which are not *in restraint of trade* are not reached by Sherman and Clayton Act penalties and remedies. If there are to be sanctions it is necessary that they be provided in the Shipping Act. Moreover, there is conduct proscribed by *other* sections of the Shipping Act, where indulged in by one carrier alone, which does not violate the Sherman Act. In respect of these matters it was necessary for the Shipping Act to provide its own sanctions.

There *was* reason for sanctions and remedies in Shipping Act, 1916 other than to displace antitrust remedies.

adopted such moratorium legislation to preserve the status quo until permanent legislation could be adopted and eventually adopted the 1961 amendments to Shipping Act, 1916.[40]

The changes to permit approval of dual-rate systems were primarily in § 14, the addition of § 14 b and some accommodating provisions to adjust to these changes. The changes to permit some form of dual-rate system are not of particular concern here. But one of the accommodating changes is of particular interest.

The Shipping Act, 1916, § 15, had provided that agreements approved under that section were exempt from the antitrust statutes. (See p. 37 above.) It has been argued, however, that under the decisions in *Cunard* and *Far East Conference,* p. 40 above, the provision was unnecessary for the reason that operation of other provisions of Shipping Act, 1916, withdrew all agreements which were subject to Shipping Act, 1916, from the operation of the antitrust statutes, whether the agreement was approved under § 15 or not. It is quite obvious this was *not* the view of Congress because when, *after* the decisions in *Cunard* and *Far East Conference,* Congress amended the Shipping Act, 1916, to permit approval of dual-rate contracts, particularly by § 14(b), *it was very careful to amend the paragraph of § 15 dealing with the exemption of approved agreements from the antitrust statutes to expressly cover those agreements permitted under § 14(b).*[41] This amendment, showing the change by italics, and taking the wording from United States Code, amended this paragraph of § 15 to read as follows:

40. For a general background of the proposed 1961 legislation including a brief resume of the Isbrandtsen litigation and the moritorium legislation see Senate Report No. 860 note 16 above.

41. The Senate Report No. 860, note 16 above, 2 United States Congressional and Administrative News, 87th Congress First Session 1961, p. 3125, states: "All provisions of § 15, Shipping Act, 1916, excepting from the antitrust laws all agreements, modifications or cancellations lawful under this section shall be extended to exempt those lawful under § 2 of this bill."

"Every agreement, modification or cancellation, lawful under this section, *or permitted under section 813(a)* [§ 14b] of this title, shall be executed from the provisions of §§ 1-11 and 15 of Title 15 and amendments and acts supplementary thereto.[42]"

That Congress thought that this change was necessary is completely at variance with the claim that even where there is no approval under § 15 the antitrust statutes can not operate. (Compare note 62 p. 62 below.)

The other principal amendments in 1961 were as follows: § 15 was amended to place limitations upon approval of agreements between conferences or members of different conferences and to adjust that section to new requirements for publication and filing of rates. § 16 was amended to permit certain proceedings to be instituted by the governor of any state or possession of the United States. Section 18 was amended by adding a new subdivision applying to foreign commerce (b) requiring the filing of tariffs (except for cargo in bulk), regulating changes in tariffs, providing that no carrier "shall charge or demand or collect or receive a greater or less or different compensation * * * than * * * specified in its tariffs" etc., permitting the Commission to prescribe the form of tariffs, permitting the Commission to disapprove any rate or charge which "it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States" and providing a penalty.

It will be noticed that even with the 1961 amendments no power is conferred upon the Commission to fix rates. The omission was deliberate.[43] The importance of this (when the question

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42. The antitrust statutes.

43. Senate Report No. 860, note 16 above, U.S. Code etc. News, *op. cit.*, p. 3132, states the reasons why it was considered "a serious mistake at this time in world affairs for the United States Government unilaterally to assert by statute such a bold claim of right to sit in judgment of the 'reasonableness' of international ocean freight rates. That which is foreign commerce in New York is Italy's in Genoa." The determination to leave rate regulation out of the statute and therefore beyond the competence of the Commission was deliberate and founded on strong reason.

is whether the scheme of an industry regulatory statute is so all-pervasive as to preclude court action, at least in advance of action by the administrative agency set up by the statute) as pointing to the conclusion that court action under the antitrust statutes is *not* precluded is pointed up in *United States v. R.C.A.,* 358 US 334, quoted in part at p. 71 below.

C. Congressional Regulation of Interstate Carriage by Water

In marked contrast with the scheme of Congress for regulation of foreign water carriage—principally by approved industry self-regulation,—are its schemes for regulation of interstate water carriage.[44] (And cf. language quoted from *Isbrandtsen,* 211 F2d 51 at pp. 95, 96 below.)

The provisions of the Shipping Act, 1916, noticed above and applying to carriage in foreign commerce also applied to interstate commerce (except § 17[45]) because they applied to all carriage covered by the Act. With them must be contrasted the provisions of § 18 applying *only* to "*interstate commerce.*"

The carriers in *interstate* commerce

(a) must establish and enforce "just and reasonable rates, fares, charges, classifications, and tariffs" and just and reasonable regulations and practices relating to tickets, bills of lading, etc., methods of marking and packing and all other matters connected with handling of property;

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44. *T.I.M.E. v. United States,* 359 US 464, 473 counsels that "striking differences which Congress saw fit to make between" its regulation of different types of carriers are matters of "significance". And the fact that this case held that an action could not be maintained because the regulatory statute involved provided for none and, in the particular circumstances, none could be found outside the statute does not mean that this same statute precludes resort to the courts in different circumstances when a cause of action *can* be found outside the industry regulatory statute. (*Hewitt-Robins, Ins. v. Eastern Freight-Ways, Inc.,* 371 US 84)

45. This applies only to foreign commerce.

(b) must file with the Commission and keep open for inspection the maximum rates, fares, etc. including those for through routes; and

(c) must not collect rates, etc., higher than the filed rates except with Commission approval and after notice, unless the Commission waives the notice.[46]

Whenever the Commission finds that any *such* rate, etc. "is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate" etc.[47]

Under § 19 if an *interstate* carrier reduces its rates below a fair and remunerative basis to injure a competitor it cannot increase the rates unless the Commission finds that the increase rests upon changed conditions other than the elimination of competition.

Even with these added provisions as to *interstate* water carriage Congress was not satisfied with its scheme of regulation for interstate commerce. In 1933 it expanded the scheme of statutory regulation of water carriers in the intercoastal trade by the Intercoastal Shipping Act, 1933 (App. pp. 16-20) and, in 1938, made this Act applicable "to every common carrier by water in interstate commerce as defined" in Shipping Act, 1916 § 1 (Intercoastal Shipping Act, 1933 § 5). No large attention need be paid to this legislation, except to notice that it expanded the statutory scheme of regulation,[48] because of the entirely revised Congressional scheme of regulation of 1940.

46. These provisions are pointed to in *Empire State Highway Tr. Ass'n v. F. M. B.*, 291 F2d 336 (Cir. Dist. Col.), c.d. 368 US 931 as making a difference between foreign and interstate commerce.

47. No such power over rates in *foreign* commerce was ever granted. (See p. 34ff above.)

48. "Every common carrier by water" subject to the Act "shall file with the Federal Maritime Board and keep open to public inspection schedules showing all the rates, fares" etc. "The schedules * * * shall plainly show" places, classifications, charges, privileges etc. "and any rules and regulations" etc. and shall be posted, under glass, on each vessel and at other specified places. It "shall be unlawful for any carrier" in any

By Title II of the Transportation Act of 1940, with *express repeal* of Shipping Act, 1916, as amended, and Intercoastal Shipping Act, 1933, as amended, "insofar as they are inconsistent with any provisions" of the Act of 1940 (Part III, Interstate Commerce Act, § 320, App. p. 50)[49] Congress adopted a new scheme of regulation of carriage by water in *interstate* commerce, by adding to the Interstate Commerce Act Part III. The provisions of Part III "were modeled on the provisions of Part I dealing with" regulation of carriage by railroad (*Cornell S.S. Co. v. United States,* 321 US 634, 637, quoting the House Report). The Act of 1940, by adding Part III to the Interstate Commerce Act, "subjected water carriers to the jurisdiction of the Interstate Commerce Commission."[50] These "water carrier provisions are part of

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way to prevent or attempt to prevent extending service to publicly owned terminals. (§ 2)

Whenever a new tariff provision is filed the Board may "enter upon a hearing concerning the lawfulness" of it and there may be certain suspensions "pending such hearing" and the Board "may make such order * * * as would be proper". (§ 3, App. p. 18.) If any tariff provision is found to be "unjust or unreasonable" the Board may prescribe the proper provision. (§ 4)

49. The provisions of the Transportation Act of 1940, Title II, as to carriage by water, are sweeping and, by consequence, the repeals provided for in § 320 (App. p. 50) are sweeping. But that Act does not apply to foreign commerce, as foreign commerce is defined in Shipping Act, 1916, § 1, (§ 302(i), App. p. 21, 22) (*Canton R. Co.,* p. 46 below) and the repealing provision of the Act of 1940 is very careful to provide (Subd. (c)) that nothing in its repealing provision shall affect the provisions of § 15 of the Shipping Act, 1916 "so as to prevent any water carrier subject to the provisions of" the Act of 1940 "from entering into any agreement under the provisions of said § 15 with respect to transportation not subject to the provisions of this chapter". Again, Congress is showing acute awareness that the antitrust statutes will apply unless their operation is suspended by some express legislative expression of intention or authorized approval.

50. The Commission, among other things, is authorized to make "such general or special rules and regulations and to issue such orders as may be necessary to carry out" the Act, to inquire into and to report on the management of the business of water carriers and affiliates in related activities and to that end obtain necessary information, to establish classifications of carriers, grant relief from the provisions of the Act when certain competition causes undue disadvantage and investigate, on complaint or on its own

the general pattern of the Interstate Commerce Act which grants the Commission power to regulate railroads and motor carriers as well as water carriers." (*United States v. Seatrain Lines, Inc.*, 329 US 424, 426, 429) This new Part III is designed "to provide for regulation of the rates and services of competing interstate water carriers as part of a broad plan of regulation for all types of competing interstate transportation facilities." (*Cornell S.S. Co. v. United States,* 321 US 634, 637; *United States v. Penn. R. Co.* 323 US 612, 616, 618) It is a detailed and all pervasive regulation paralleling that of Part I for railroads and serves to make clear the entirely different ideas which Congress had in respect of regulation of carriage by water in *foreign* commerce and in *interstate* commerce. This new Part of the Interstate Commerce Act "does not apply to carriers engaged in foreign commerce insofar as their carriage beyond the limits of the United States is concerned, 49 USC § 902(i)(3) [App. pp. 21, 22]" (*Canton R. Co. v. Rogan,* 340 US 511, 514, note 2), i.e. it does not apply to carriers in foreign commerce as defined in Shipping Act, 1916.

Part III of the Interstate Commerce Act is far too detailed and far too long to warrant extended review here. Its principal provisions are set out at length in the Appendix, p. 20 and following. The most cursory examination of it will show that it is, like Part I, a classical example of detailed and all pervasive regulation of an industry, policed by an administrative agency set up to administer the statute and to which is granted the power to fix rates (§ 307), in sharp contrast with the few general duties imposed on foreign commerce by Shipping Act, 1916, and that statute's principal provision in § 15 for industry self-regulation by approved arrangements between carriers, with no power in the administrative agency to fix rates. Some examples of requirements

initiative, alleged failures to comply with the Act or requirements established under it and to make appropriate order for compliance. (§ 304, App. p. 23. Cf. § 307.)

of Part III, not to be found in Shipping Act, 1916, and very shortly indicated only by way of example, are: The duty imposed to provide transportation "upon reasonable request", "to establish reasonable through routes" and provide facilities "for the interchange of traffic" (§ 305). Transportation subject to the Act shall not be undertaken without duly filed and published tariffs (§ 306) and to engage in carriage by water "a certificate of public convenience and necessity" for common carriers, or a "permit" for contract carriers, issued by the Commission, is required (§ 309). The Commission can require filing of reports and contracts, "prescribe a uniform system of accounts", regulate "depreciation charges" and inspect and copy records (§ 313). There are, of course, detailed provisions covering rates and services and the Commission can establish classifications, rules and regulations (§ 304), prescribe "the lawful rate, fare or charge or the maximum or minimum, or maximum and minimum" etc. (§ 307 (b) and (h)), establish through routes and joint rates etc. (§ 307(c)) and the division thereof (§ 307(e)), suspend tariffs pending investigation (§ 307(g)) and regulate allowances to owners of property for services (§ 314).

It hardly seems necessary to add that Part III, like the statute on which it is modelled, has full provisions requiring that rates must be reasonable and non-discriminatory, providing that whether they are or not is within the competency of the statute's administrative agency to determine, and requiring that the common carriers to whom the Act applies collect only the rates and charges shown by duly filed and published tariffs. When there is a complaint that improper charges have been made by carriers these and their related provisions call for the application of *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 US 426, *Keogh v. Chicago & N.W. Ry.*, 260 US 156 and like cases, just as did the provisions of Interstate Commerce Act, Part I, from which the provisions of Part III are copied. But where such provisions are omitted, as they are omitted from Shipping Act, 1916, and

where the omission by Congress (with the Interstate Commerce Act before it, and with sound reason as appears from the Senate Report on the proposed 1961 amendments to Shipping Act, 1916, [see note 43 above]) could be nothing but deliberate, and where, in the statute which was adopted (Shipping Act, 1916), the Congress provided its own test as to whether the antitrust statutes would apply or not (by providing they would not apply to Commission approved agreements,—Shipping Act, 1916 § 15 p. 37 above) there is no room, we submit with deference, for application of *Abilene* or *Keogh* or to deny application of the antitrust statutes and the availability of their remedies.

D. Carriers by Water in Foreign Commerce Can Obtain Exemption from Liability for Clayton Act § 4 Treble Damages Only in the Way Congress Provided in Shipping Act, 1916, § 15

To paraphrase language from *Silver v. New York Stock Exchange,* 373 US 341, 349, the problem here arises from the need to reconcile pursuit of the antitrust aim of eliminating restraints on competition (here by application of the provision of Clayton Act § 4 and recovery of treble damages) with the effective operation of a public policy contemplating that water carriers in foreign commerce will engage in self-regulation which may well have anti-competitive effects in general and in specific applications. (And compare *McLean,* p. 2 above.)

The problem here is not really broader than in *Silver*. The only antitrust violation charged is price fixing, a *per se* violation, and the only relief sought is treble damages. There is no claim that defendants' conduct violated any of the Shipping Act, 1916's provisions proscribing conduct not resting in agreement or provisions whose application requires determination of "fairness" or "reasonableness" or "discrimination" or requires "more than ordinary familiarity with ocean transportation". The only charge is illegally increasing the lawfully established rate by $2.50 per ton

under a price fixing agreement and the only provision of Shipping Act, 1916 drawn in question is § 15 for industry self-regulation by approved agreements.

In such circumstances there are a variety of ways in which the earlier statute of wide application, based on a policy of eliminating restraints on competition and implementing that policy by outlawing price fixing agreements (p. 6 above), could be accommodated to the later statute for a single industry and based on a policy and scheme of industry self-regulation which contemplated some price fixing. By and large the accommodation could be by (1) a general or *pro tanto* replacing of the earlier broad statute by the later statute in the area covered by the later statute, whether expression of the result is by the legislature or by the courts because of the necessary effect of the later statute or (2) by providing for making an accommodation by some agency on a case by case basis as each situation arose. For industry self-regulation of common carriage by water in *foreign* commerce the latter course was adopted by Congress. Under its plan the antitrust statutes operate except when the conduct to which otherwise they would apply is excepted, on a case by case basis, because it is part of a Commission approved arrangement for industry self-regulation.

It is certain that operation of the antitrust statutes is not here precluded because Congress said so. There is no provision for express repeal in Shipping Act, 1916, either in general or *pro tanto* as there is of Shipping Act, 1916 in Part III, Interstate Commerce Act, § 320 (App. p. 50). Nor, what is much the same, is there in the Shipping Act, 1916, by force of its own express provisions, and without other action or intervention, an exception of any conduct of water carriers in foreign commerce from operation of the antitrust statutes, although litigation threatening application of the antitrust statutes was one of the things that moved Congress to study the shipping industry and the needs for its regulation (see *Isbrandtsen Co.*, p. 34 above).

But though Congress has not in terms said the antitrust statutes are displaced, still what it did in the later industry statute, it has been argued, is so at variance with application of the antitrust statutes that the courts must recognize that, to the extent of the conflict, this is the result and the antitrust statutes are displaced. The court below did not apply this rule but defendant-respondents have argued it and their answers to the petition for certiorari indicate they will argue it again, by euphemistically saying the Shipping Act, 1916 has "superseded" the antitrust statutes; that the case is one for application of a doctrine of "supersession." We prefer the time-honored name for what they have in mind and deny that there has been any repeal by implication of the antitrust statutes. As in *Mercantile Nat. Bank v. Langdeau,* 371 US 555, 565 defendant-respondents' contention of supersession "is necessarily one of implied repeal requiring some manifest inconsistency or positive repugnance between the two statutes."

The rule cannot be questioned that "repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, *and are not absolutely irreconcilable, effect should be given, if possible, to both of them." (United States v. Greathouse,* 166 US 601, 605) A statute will not be construed as taking away a right "unless that result is *imperatively* required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right *would in effect deprive the subsequent statute of its efficacy;* in other words, *render its provisions nugatory."* (*Texas & P.R. Co. v. Abilene Cotton Oil Co.,* 204 US 426, 437.)

It is unnecessary to review the question at large because the rule repeatedly has been stated and applied where it has been held that a general industry regulating statute did not repeal by implication, or supersede, or take the place of, or make inoperative, the antitrust statutes. These decisions, holding that there was no such repeal, not only announce the stringent limitations on finding a repeal by implication, but necessarily stand for the

proposition, articulated in *Georgia v. Penn. R. Co.*, 324 US 439, 456, that "Regulated industries are not *per se* exempt from the Sherman Act."[51]

Upon this precise subject the leading and much cited case is *United States v. Borden Co.*, 308 US 188, 197 ff,[52] concerned with application of the antitrust laws in the field of agriculture where there had been a very considerable amount of industry regulatory legislation. This Court said, addressing itself directly to the question of repeal of the antitrust statutes by implication (p. 198):

> "It is a cardinal principle of construction that repeals by implication are not favored. *When there are two acts upon the same subject, the rule is to give effect to both if possible.* (Citing cases) The intention of the legislature to repeal 'must be clear and manifest.' (Citing case) It is not sufficient, as was said by Mr. Justice Story in Wood v. United States, 16 Pet 342, 362, 363, 10 L ed 987, 995, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' *There must be 'a positive repugnancy* between the provisions of the new law, and those of the old; and even then the old law is repealed by implication *only pro tanto to the extent of the repugnancy.'* (Citing case)"

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51. *S. S. W., Inc. v. Air Transport Ass'n*, 191 F2d 658, 661 (Dist. Col. Cir.): "But, in view of the importance of the antitrust laws to the unregulated part of the economy, the rule has been developed that the mere existence of a regulatory statute does not result in complete withdrawal of the regulated industry from the operation of the antitrust laws. Such repeals by implication are not favored. The antitrust laws have been held to be superseded by specific regulatory statutes *only* to the extent of the repugnancy between them." (*Italics in original.*)

52. *United States Alkali Exp. Ass'n v. United States*, 325 US 196, 209 reviews at some length the holding in *United States v. Borden Co.*, 308 US 188, that the Capper-Volstead Act did not operate to curtail the authority of the United States to maintain antitrust suits or give "exclusive jurisdiction" to the Secretary of Agriculture to determine whether there were violations of the Sherman Act and his action was neither a substitute for, nor a prerequisite to, a suit by the United States. *Borden Co.* is also dealt with below at p. 64 and in note 64.

Georgia v. Penn. R. Co., 324 US 439, 456, important also because it recognized the very different situation presented in *Keogh,* 260 US 156 and the limitations of that case, involved rate-fixing by rail carriers subject to the very thoroughgoing regulation of the Interstate Commerce Act. It was held that where there was no square repugnancy the antitrust laws still applied. The court said:

> "These carriers are subject to the anti-trust laws. United States v. Southern P. Co. 259 US 214. 66 L ed 907, 42 S Ct 496. Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. United States v. Trans-Missouri Freight Asso. 166 US 290, 41 L ed 1007, 17 S Ct 540; United States v. Joint Traffic Asso. 171 US 505, 43 L ed 259, 19 S Ct 25. * * * It is true that the Commission's regulation of carriers has greatly expanded since the Sherman Act. See Arizona Grocery Co. v. Atchison, T. & S.F. R. Co., 284 US 370, 385, 386, 76 L ed 348, 353, 354, 52 S Ct 183. But it is elementary that repeals by implication are not favored. Only a *clear repugnancy* between the old law and the new results in the former giving way *and then only pro tanto to the extent of the repugnancy.* United States v. Borden, supra, (308 US 198, 199, 84 L ed 190, 191, 60 S Ct 182)."

Silver v. N. Y. Stock Exchange, 373 US 341, had for decision whether the antitrust statutes were superseded by the Securities Exchange Act and its scheme of industry self-regulation.[52a] After stating the problem in language which we have paraphrased,

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52a. The scheme of self-regulation was that of adoption of rules and regulations by exchanges. These were not wholly at the whim of the exchanges because the Act placed upon the exchanges a duty to register with the Commission, registration could not be granted unless the exchange submitted copies of its rules and unless the rules were just and adequate to insure fair dealing and to protect investors, the Commission was given power to order changes in exchange rules with respect to a number of subjects and registration was subject to some control of the Commission. (15 USC § 78s)

above at p. 48, the court said that "the proper approach to this case, in our view, is an analysis *which reconciles the operation of both statutory schemes with one another* rather than holding one completely ousted."

> "The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and '[i]t is a cardinal principle of construction that repeals by implication are not favored.' United States v. Borden Co. 308 US 188, 198, 84 Led 181, 199, 60 S Ct 182; see Georgia v. Pennsylvania R. Co. 324 US 439, 456, 457, 89 Led 1051, 1062, 65 S Ct. 716; California v Federal Power Com. 369 US 482, 485, 8 Led 2d 54, 57, 82 S Ct 901. Repeal is to be regarded as implied *only if necessary* to make the Securities Exchange Act work, *and even then only to the minimum extent necessary.* This is the guiding principle to reconciliation of the two statutory schemes."

The very recent *United States v. Philadelphia Nat. Bank,* 374 US 321, 350, held that the antitrust statutes were not superseded by the Bank Merger Act and proceedings under it:

> "No express immunity is conferred by the [Bank Merger] Act. *Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored*[53] and have only been found in cases of *plain repugnancy* between the antitrust and regulatory provisions.[54] Two recent cases, *Pan American World Airways, Inc. v. United States,* 371 US 296, 9 Led

53. At this point, in its footnote 28, the Court collects 18 of its own decisions beginning with the *Trans-Missouri Freight Association Case,* 166 US 290, 314 and coming down through *Silver v. New York Stock Exchange,* 373 US 341.

54. The Court at this point cites, in its note 29, *Keogh,* 260 US at 163, the *Panagra Case, Pan American etc. v. United States,* 371 US at 309, 310 and "Cf." the *Abilene Oil Case,* 204 US 426.

2d 325, 83 S Ct 476, and *California v. Federal Power Com.*, 369 US 482, 8 Led 2d 54, 82 S Ct 901, illustrate this principle."

There is no such plain repugnancy between the antitrust statutes and the substantive provisions of Shipping Act, 1916 (the provision in § 15 for exemption of approved agreements aside,—we deal with this below) as would work a repeal of the former by the latter. Not even *Cunard*, 284 US 474 (dealt with at p. 80ff below) or *Far East Conference*, 342 US 570 (dealt with at p. 83ff below) has suggested this and, indeed, there is a clear implication in the latter that there was no such repeal (see pp. 84, 85 below). There is no repugnancy between prohibition of restraint of trade, attempt to monopolize, and monopoly of the Sherman Act and prohibition of the use of fighting ships, unjust and unreasonable practices, discriminations and preferences, false billing and the like of the Shipping Act.

Two somewhat special considerations remain to be noticed. The first is that the industry regulatory statute provides some remedy. The second has to do with a limited form of agency approval.

There has been an attempt to argue that Shipping Act, 1916, has provided a remedy which Petitioner might (but did not) invoke and therefore this remedy is exclusive. But a statutory remedy, even one for relief through administrative channels, is not of necessity repugnant to other remedies at common law or by statute. The Interstate Commerce Act, by providing for proceedings for relief before the Commission, saving common-law remedies and expressly providing for an election to proceed in Court or before the Interstate Commerce Commission, demonstrates this. It may be that a claimant by selecting one remedy forecloses later resort to the other (see note 57 below) and a claimant will not be permitted to have two satisfactions. Still

this does not mean that there cannot be dual and parallel remedies and enforcement and that a claimant cannot have his choice as to the course he will follow (*United States v. Philadelphia National Bank*, 374 US 321, 347; *United States v. W. T. Grant Co.*, 345 US 629. Cf. *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285) particularly where the statutory remedy is not an equivalent (*Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 US 84[55]; *Panagra-Pan American World Airways, Inc. v. United States*, 371 US 296 and its comments on *Hewitt-Robins*[56]; *Far East Conference*, pp. 84, 85 below; *Georgia v. Penn. R. Co.*, 324 US 439; *United States v. Borden Co.*, 308 US 188, 205, 206 here comparing the Capper-Volstead Act with the antitrust laws,—we deal with it elsewhere; *International Assn. etc. v. Gonzales*, quoted in note 30 p. 32 above; *Trans World Airlines, Inc. v. Hughes*, quoted in note 30, p. 32 above). No one will assert that anything the Commission could award under Shipping Act, 1916 § 22, or that could be recovered by action under § 30 if the award is not satisfied, is remotely the equivalent of the remedy under Clayton Act § 4 (see p. 29 above).

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55. Whether the pre-existing remedy survives "depends on the effect of the exercise of the remedy upon the statutory scheme of regulation." The remedy survives where "rather than running interference against the Act the exercise of the judicial remedy supports its overall purposes and is in nowise inconsistent with the Congressional scheme embodied within its four corners." It was held that a shipper could maintain an action for damages suffered as a result of a carrier's improper routing practices even though the Commission, apparently, had some control of the practices, i.e. could issue a cease-and-desist order.

56. "If it were clear that *there was a remedy in this civil antitrust suit that was not available in a § 411 proceeding before the C.A.B., we would have the kind of problem presented in Hewitt-Robins, Inc. v. Eastern Freight-Ways Inc.*, 371 US 84, where litigation is held by a court until the basic facts and findings are determined by the administrative agency, *so that the judicial remedy not available in the other proceeding, can be granted.*"

See further the language quoted pp. 91, 92 below.

The matter of exclusive remedy does not end here. The argument that Shipping Act, 1916 §§ 22 and 30 provide the only remedy by way of money compensation for damage resulting from conduct that violates the antitrust statutes and Shipping Act, 1916 § 15 presents a problem more fundamental than that of statutory construction. To so construe Shipping Act, 1916 and to attribute to it that effect would render these remedial provisions unconstitutional under the guaranty of right to jury trial of the Seventh Amendment.

Relief in specie under Shipping Act, 1916 §§ 22 and 29, by cease-and-desist or similar order, presents no such problem. Such relief has its opposite number in relief in equity where there is no trial by jury as matter of right. There cannot be the constitutional objection to direct enforcement of such an order, as provided for in § 29 (see p. 38 above). But where the claim is for *money,* and so is of the sort to which the guarantee of the Seventh Amendment applies (see note 38 p. 38 above), if the only procedure provided is to obtain an agency award and, if not complied with, enforcement of the award *with no opportunity to retry the merits,* the respondent upon whom the result is forced properly can complain that he had been deprived of his right of jury trial. To avoid this result the rights of *respondents* to jury trial are preserved by the Shipping Act. The respondent can refuse to pay. Under § 30, if the money award under § 22 is not complied with the claimant (as his *only* recourse) can then sue on his original claim, there is a trial *de novo,* in the action the Commission award is not conclusive but is only *prima facie* evidence and the defendant is entitled to assert all defenses before a jury. (See notes 37 and 38 p. 38 above). All this is spelled out in cases under Interstate Commerce Act § 16(2) as amended by the Act of March 2, 1889, designedly to avoid the constitutional objection just noticed (see note 58), which is the prototype of

Shipping Act, 1916 § 30: *United States v. I.C.C.*, 337 US 426, 437[57]; *Western etc. R. Co. v. Penn. Ref. Co.*, 137 Fed 343, 349[58] (Cir. 3), aff'd 208 US 208.

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57. This case (by quotation from *Baltimore & O. R. Co. v. Brady*, 288 US 448, 458) explains: "It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that Congress saved their rights to be heard *in court upon the merits* of claims asserted against them. The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final as to him."

The rule of election stated in this quotation is recognized and stated in *Terminal Warehouse Co. v. Penn. R. Co.*, 297 US 500, see esp. 507, and *Union P. R. Co. v. Price*, 360 US 601.

The provision of Interstate Commerce Act § 16(2), the section involved, is almost word for word the same as Shipping Act § 30 and provides: "If a carrier does not comply with an order for the payment of money * * * the complainant * * * may file in the district court * * * a complaint *setting forth briefly the causes for which he claims damages*, and the order of the Commission" and on the trial "the findings and order of the Commission shall be *prima facie evidence* of the facts therein stated". (49 USC § 16(2))

58. "Under the act as originally passed such proceedings [for enforcement] were solely in equity. As the *constitutional guarantee of the right to trial by jury* attaches to the enforcement in a federal court of an order or requirement of mere pecuniary reparation, there was no means to compel payment, and such order or requirement, if not a nullity, was at least ineffective. It was, consequently, the uniform practice of the commission, prior to the taking effect of the amendatory act of March 2, 1889, c. 382, 25 Stat. 855 [U.S. Comp. St. 1901, p. 3158] to decline to order, require or recommend pecuniary reparation. Councill v. Railroad Co., 1 Interst. Com. Com'n R. 339; Heck & Petree v. Railway Co., 1 Interst. Com. Com'n R. 495; Riddle, Dean & Co. v. Railroad Co., 1 Interst. Com. Com'n R. 594, 607; Rawson v. Railroad Co., 3 Interst. Com. Com'n R. 266; Macloon v. Railway Co., 5 Interst. Com. Com'n R. 84. Such refusal on the part of the commission was based on one or the other of two grounds; one of them being, as stated in Heck & Petree v. Railway Co., that '*the claim for pecuniary damages made by complainants * * * presents a case at common law in which the defendants are entitled to a jury trial*'; and the other as stated in Rawson v. Railroad Co., that 'as the statute provided for no trial by jury in the courts to enforce our awards in controversies such as were triable at Common Law and where more than twenty dollars was involved, we could award no reparation *in consequence of the provisions of the seventh amendment* to the Constitution of the United States.' But by the act of March 2, 1889, c. 382, § 5, 25

This takes care of any question the *respondent* could raise. But it does not take care of the case of a *claimant* who is awarded nothing or less than he thinks he should get. Under Shipping Act, 1916, no trial *de novo,* with trial by jury, is provided for him.[59]

Under the Interstate Commerce Act there is no problem as to claimants. Common-law remedies are preserved and if the claimant elects not to pursue them, but to proceed under the Act, he has had his choice and is bound by his election (see note 57 above). But, under the Shipping Act, 1916, if the claim is one against a common carrier by water in foreign commerce and *if* the *only* remedy available is resort to the Commission under Shipping Act, 1916 § 22, there is no further proceeding available in which the merits can be tried to a jury for a claimant *denied* relief by the Commission. So such claimant *also has been deprived of trial by jury.*[60] This is the very result which the Court of Ap-

Stat. 859 [U.S. Comp. St. 1901, p. 3167] § 16 (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U.S. Comp. St. 1901, p. 3165]) was so amended as to provide for trial by jury and judgment as at common law on the law side of the court in proceedings for the enforcement of orders or requirements of the commission involving matters 'founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States.' In proceedings at law under section 16, as amended, for the enforcement of an order or requirement of the commission, the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury."

59. Section 30 applies only "In case of violation of any order * * * for the payment of money". If no award is made there is no order that can be violated. If the order is for less than the claimant wants but the respondent offers to pay there is no violation.

60. He may have the denial of relief reviewed and in a proper case the Commission's decision would be set aside, but still he would not have a jury trial whether this was final or he was sent back to the Commission. His only review is under the Review Act of 1950, 5 USC § 1031ff and is exclusively by Courts of Appeals under 5 USC § 1032 (*D. L. Piazza Co. v. West Coast Lines, Inc.,* 210 F2d 947 (Cir. 2), c.d. 348 US 839, result recognized in *United States v. Philadelphia Nat. Bk.,* 374 US 321, 354).

peal envisaged for Petitioner Carnation Company and its present claim. The Court was rather full in suggesting how the Commission might find ways to deny an award to Petitioner with the necessary implication that if such an award were sought and denied Petitioner was all through! If this is the result Carnation's claim, not as a matter of its election, but by a course of proceedings forced on it, would have been determined against it without jury trial.

The second special consideration suggested above p. 54 is the provision, in an industry regulating statute, forbidding specified transactions (as mergers) without the approval of the statute's policing agency and providing for such approval in proper cases. If application has been made to the agency and permission has been denied nothing is done and there is no antitrust violation. But if the agency has been applied to and has given approval, or can still act to give approval, and the situation is such that in acting it can or should give consideration to the antitrust statutes and their policy, or may resolve industry question which could reflect on the resolution of claims of antitrust violation, how far is it open to courts to entertain antitrust litigation? The answer is that where the agency is given no power to decide antitrust issues as such, and is given no power to exempt from the antitrust statutes, the antitrust issues can and must be decided by the courts, whether the administration agency has acted or not. If the agency has not acted, under *California v. Fed. Power Com'n,* below, (and see p. 28 above) the courts must not wait on agency action but must proceed promptly with the discharge of their own proper functions.

United States Alkali Export Ass'n v. United States, 325 US 196;

United States v. R. C. A., 358 US 334;

California v. Fed. Power Com., 369 US 482;

United States v. Philadelphia Nat. Bk., 374 US 321;

United States v. First Nat. Bk. etc. of Lexington, 376 US 665.

United States Alkali Exp. Ass'n held that exclusive jurisdiction of aspects of foreign trade was not vested in the Federal Trade Commission, under the Webb-Pomerene Act. The argument was that it was implicit from the statute as a whole that the Commission should act before the Attorney General acted. In rejecting the argument the Court pointed out that "a pro tanto repeal" of the antitrust statutes "would require a clear expression of that purpose by Congress"; that the Act did not give the Commission power to make "any binding adjudications" under the antitrust statutes. Even if the case were one of concurrent jurisdiction, grant of power to the Commission "would curtail the authority of the United States to conduct antitrust suits *only if it were deemed to be an implied repeal pro tanto* of § 4 of the Sherman Act. As we pointed out in *U. S. v. Borden Co.*, supra, such repeals by implication are not favored."[61]

United States v. R. C. A., above, is most significant. There was an exchange of television stations. The necessary approval, under the Federal Communications Act, of the Federal Communications Commission *had been obtained*. Approval was not to be given unless the "public interest, convenience, and necessity" will be served and the Commission was to take into consideration federal antitrust policy. But it was still open to the United States to bring action under the antitrust laws. The regulatory scheme of the Communications Act had not so displaced the Sherman Act that attack for antitrust reasons could only be by direct review. The court very carefully reviewed the industry regulatory statute, compared it with regulation under other statutes, pointed out that its scheme *was not all-pervasive*, that it could not be concluded that the FCC had authority "to pass on antitrust violations as such" and held that, as a result, "courts retained jurisdiction to pass on alleged antitrust violations irrespective of Commission action." (See esp. p. 348ff) The significant teaching is that in

61. See note 52 above.

determining whether the antitrust statutes must give way, *the scheme of the regulatory act must be looked to,* it must be recognized that the scope of all industry statutes is not the same, that some are not all-pervasive and that *where the scheme is not all-pervasive in the area of possible antitrust violation the antitrust statutes are not displaced.* We have pointed out (see p. 33 ff above) that the scheme of regulation of carriage by water in *foreign* commerce under the Shipping Act is not all-pervasive, particularly in comparison with the scheme of regulation of carriage by water in *interstate* commerce.

California v. Fed. Power Com. carries *United States v. R. C. A.* on one step. The Federal Power Commission granted the authority for a merger required under the National Gas Act, in spite of a Government attack on the proposed transaction in an antitrust suit. It was pointed out: "Here, as in United States v. Radio Corporation of America, 358 U.S. 334, while 'antitrust considerations' are relevant to the issue of 'public interest, convenience, and necessity' (id. 358 US at 351), there is no 'pervasive regulatory scheme' (ibid.) *including the antitrust laws* that has been entrusted to the Commission." It was held that it was the duty of the district court *to proceed with the antitrust litigation* without waiting upon any action by the Commission and it was the duty of the Commission to hold its hand until the antitrust litigation had run its course. A decision affirming the agency action was reversed.

United States v. Philadelphia Nat. Bk., and the *Lexington Bank Case* held that approval of a bank merger under the Bank Merger Act, did not preclude an attack under the antitrust laws. We have quoted at p. 53 above what the *Philadelphia Bank Case* had to say about repeal by implication. It held that *California v. Fed. Power Com.,* above, controlled rather than *Panagra, Pan American World Airways, Inc. v. United States,* 371 US 296, pointing out: *California v. FPC* held that approval did not confer immunity even though the agency had taken into consideration the com-

petitive factor; in spite of detailed regulation and close supervision of many phases of banking Congress did not "embrace the view that federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory statute, or disruptive of that function." The "close surveillance of the industry with a view toward preventing unsound practices * * * does not make federal banking regulation all-pervasive".

Extended comment is not required to point up the pertinency of these cases in view of the very limited and non-pervasive scheme of regulation of carriers by water in *foreign* commerce.

These cases emphasize what we have said before (see the quotation from *Georgia v. Penn. R. Co.*, p. 51 above), that regulated industries, even where the regulation is detailed and the industry regulatory statute sets up an agency or agencies to administer the statute and police compliance, are not *per se* exempted from the antitrust statutes.

Still more important for the case at bar are the decisions under statutes which, like Shipping Act, 1916 § 15 (p. 37 above), provided for accommodation of antitrust policy with the terms and policy of industry regulatory statutes on a case by case basis by authorizing the policing agency under the industry regulatory statute to approve conduct of a described sort and providing that upon such approval the approved conduct is exempted from the antitrust laws.[62] Such a scheme of accommodation has not only the advantage of postponing the determination whether to make the accommodation, by lifting the ban of the antitrust statutes, until the problem presents itself concretely in terms of the specifics of

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62. E.g. Interstate Commerce Act, 49 USC §§ 5(11), 5b(9); Federal Aviation Act, 49 USC § 1384; Communications Act of 1934, 47 USC §§ 221(a), 222(b)(i); Agricultural Marketing Agreement Act, 7 USC § 608b. Notice those adopted *after* Shipping Act, 1916 § 15 and *after Cunard*, 284 US 474 (1932). We are told that the provisions of Federal Aviation Act (49 USC §§ 1382 and 1384) were modeled on Shipping Act, 1916 § 15 (*McManus v. CAB*, 286 F2d 414, 419 (Cir. 2), c.d. 366 US 928).

the precise phase of the industry involved and of the very transaction for which immunity from the antitrust laws is sought, but has the further advantage of permitting the administrative agency, charged with the duty of approval or disapproval, to do more than say just "yes" or "no" but to vary "the precise adjustments which it must make * * * from instance to instance" (*McLean Trucking Co. v. United States,* 321 US 67, 80; cf *Isbrandtsen,* 211 F2d 51 quoted at p. 96 below) and to select among possible alternatives (cf. *Minneapolis & St. L. R. Co. v. United States,* 361 US 173). The scheme contemplates that the approving agency shall have some room to move in. Under such a scheme failure to apply for approval or denial of approval does not exempt from the antitrust statutes. The mere "existence of the authority" to approve "although unexercised" does not "destroy[s] the operation of § 1 of the Sherman Act" (*United States v. Borden Co.,* 308 US 188, 198). The effect of failure to apply for or obtain approval is settled.

The following are decisions under statutes of the sort just noticed:

United States v. Borden Co., 308 US 188;

United States v. Socony-Vacuum Oil Co., 310 US 150, 226;

McLean Trucking Company v. United States, 321 US 67;

Minneapolis & St. L. R. Co. v. United States, 361 US 173;

Maryland & Virginia etc. Ass'n v. United States, 362 US 458;

Isbrandtsen Co. v. United States, 211 F2d 51, 57 (Cir. Dist. Col.), c.d. 347 US 990;

Chicago & N.W. Co. v. Peoria & Pekin etc. Co., 201 F. Supp 241 (So. Dist. Ill.), aff'd 319 F2d 117 (Cir. 7), c.d. 375 US 969.

California v. Fed. Power Com'n, 369 US 482, 485, referring to the holding in *Maryland v. Virginia etc. Ass'n v. United States,* above, that a transaction in question was not one of the sort covered by the authority of the Secretary of Agriculture to approve

under the Capper-Volstead Act and therefore was properly condemned by the District Court, and citing *United States v. Borden Co.,* above at pp. 190-192, summarized what is the holding of the above cases by saying:

> "We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nevertheless granted an overall inclusive one."

In *McLean* and *Minneapolis & St. L. R. Co.,* above, consolidations had been approved. The holdings are, necessarily, that the Commission's act in approving is open to direct attack for failure to accord sufficient weight to the policy of the antitrust statutes,—the claim, though rejected was entertained,—and it is implicit in the holdings that only *proper* approval of the transaction can immunize it from direct operation of the Sherman and Clayton Acts.

The square holding of *United States v. Borden Co.,*[63] above, speaking of the authority of the Secretary of Agriculture, by affirmative action, to immunize from operation of the antitrust statutes,[64] appears from the following:

> "In the opinion of the court below, the existence of the authority vested in the Secretary of Agriculture, although

63. See note 52 above.

64. The lower court had held that since under the Agricultural Marketing Agreement Act regulatory powers had been conferred upon the Secretary of Agriculture operation of the antitrust statutes was superseded. This Court reversed. It said that the lower court attributed this effect to the statute *per se* "that is, to its operation in the absence, and without regard to the scope and particular effects, of any marketing agreement * * *." It answered with the language quoted above in the body and then stated, in the language quoted above at page 51 the rule as to repeal by implication and went on to point out that under the Agricultural Act "a particular plan is set forth" to carry out the policy of that Act; that the "statutory program" to be followed "requires the participation of the Secretary of Agriculture" and that the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact *that the former is delimited by the prescribed action participated in and directed by an officer of the Government.*

unexercised, wholly destroys the operation of § 1 of the Sherman Act with respect to the marketing of agricultural commodities.[64]

"We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they may contain, the commerce in agricultural commodities is stripped of the safeguard set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. *We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create 'so great a breach in historic remedies and sanctions.'* "

To the same point the Court further said:

"It is not necessary to labor the point, *for the Argicultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable.* * * * These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. *If Congress had desired to grant any further immunity Congress doubtless would have said so.*"

United States v. Socony-Vacuum Oil Co. makes clear that exemption from the antitrust statutes can be obtained only through affirmative and effective action; that claimed acquiescence by government employees could provide no immunity from the antitrust laws for *"Congress has specified the precise manner and method of securing immunity. None other would suffice"*; that even if proper approval had been had, the immunity obtained *would not survive the expiration of the Act under which the approval was given.* (310 US at 226, 227)

Maryland & Virginia etc. Ass'n, following *Borden Co.,* held that no immunity from the antitrust statutes was provided by the scheme alone of the Capper-Volstead Act, nor by the provision that immunity might be granted by action of the Secretary of Agriculture where there had been no such action.

The part of *Chicago & Northwestern,* above, with which we are concerned, is the holding that a proceeding under Interstate Commerce Act § 5 (2) will not serve as a substitute for approval under § 5(1) providing for the approval of pooling agreements, because the ICC never made the findings required under § 5(1). There was no immunity from attack under the antitrust statutes because "the Interstate Commerce Commission has never been asked to, and never has attempted to authorize such pooling under Section 5(1) of the Act."

Isbrandtsen Co. v. United States, 211 F.2d 51, 57 (Cir. Dist. Col.), c.d. 347 US 990, above, goes no farther than these cases but applies their reasoning to a Shipping Act case. (See p. 95 below.)

It is implicit in all of these cases that whether the approval necessary to exempt from the antitrust cases was or was not given is an antitrust question and justiciable. In *Borden Co.,* the court could determine whether the Secretary of Agriculture had acted so as to exempt from the antitrust statutes. The question did not have to be sent to him for determination. In *Socony-Vacuum Oil* the Court directly passed on the sufficiency of the conduct claimed to amount to approval and held that it did not. Nor does the possibility that both statutes may have been violated mean that allowing antitrust treble damages is repugnant to the industry regulatory statutes. To the contrary they are complementary. This was the conclusion of Congress when, with the precise question drawn to its attention (*Isbrandtsen,* p. 34 above) it deliberately elected to exempt from the antitrust statutes only approved agreements.

It is commonplace that the same conduct can violate more than one statute (*Federal Trade Com'n. v. Cement Institute,* 333 US 683, 693ff; *S. S. W. Inc. v. Air Transport Ass'n,* 191 F2d 658, 664, col. 1 (Cir Dist Col),—pointing out that the antitrust laws continue to operate unless there is absolute repugnancy with a later controlling statute). In the case at bar no injunctive relief is sought; no relief which will embarrass either the operation of the Shipping Act or the Commission. Concededly if application to the Commission for reparations were made money relief could be granted and payment enforced by jury trial under § 30. The fact that under the antitrust statutes the money recovery will be threefold although more unpleasant for the defendants will no more affect the operation of the Shipping Act and performance of its functions by the Commission than would single recovery under Shipping Act §§ 22 and 30.

In the circumstance, where Congress in Shipping Act § 15 has provided the way for working exemption from the antitrust statutes and the means provided have not been used, it would seem entirely improper, under the cases just noticed, to attempt to find some other reason for exemption. The antitrust statutes are applicable and no reason appears why they are not *fully* applicable,—no reason appears why they apply only in part,—and the provisions for remedies are as applicable as are the rest.

E. Nothing in the Functions of the Federal Maritime Commission Stands in the Way of Clayton Act § 4 Treble Damage Actions

1. The Doctrine of Primary Jurisdiction

Avoiding really coming to grips with the proposition that Congress, in § 15 of the Shipping Act, has provided the definitive test for determining when conduct of common carriers by water in foreign commerce is exempted from the antitrust treble damage actions and that when not so exempted, by Commission approval, the antitrust statutes, and *all of them* including the

Clayton Act, § 4 treble damage provision, can be applied, it is said that the present action cannot be maintained (even if there is no implied repeal of the antitrust statutes) because such employment of the judicial process is not compatible with the performance by the Commission of functions committed to it by the Shipping Act. For this *United States Navigation Co. v. Cunard S. S. Co.*, 284 US 474 and *Far East Conference v. United States*, 342 US 570 are relied on. The doctrine on which they rest is a growth from *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 US 426 (see *United States v. R.C.A.*, p. 70 below). A landmark decision in the course of the doctrine's development is *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285, setting limits and holding the doctrine did not apply and that the court should proceed to decision. In *Cunard* this decision was the Court's principal reliance. *Far East Conference* did little more than follow *Cunard*.

For want of a name generally found to be better the doctrine is known as the primary jurisdiction doctrine.

The "doctrine requires judicial abstention in cases where *protection of the integrity of a regulatory scheme* dictates *preliminary* resort to the agency which administers the scheme" (*United States v. Philadelphia Nat. Bk.*, 374 US 321, 353) as a "mode of accommodating the complementary roles of courts and administrative agencies" (*Far East Conference v. United States*, 342 US 570, 575). It is a rule of administration for "promoting of proper relations between the courts and administrative agencies charged with particular regulatory duties" (*United States v. Western Pac. R. Co.*, 352 US 59, 63). In this respect the doctrine is not wholly unlike the mode of accommodating statutes themselves by use of another judicial doctrine, the doctrine of implied repeal (pp. 50-54 above). The doctrine is one for allocating the handling of the business of governing among available agencies and not one for the determination of substantive rights. As in *Far East Conference*, p. 83 below, and in *Panagra*, p. 89 below, the question is

not of the relief to which a plaintiff is entitled,—whether more or less than that contemplated by the antitrust statutes,—but *only* of where to go to get it. Indeed, in *United States v. Philadelphia Nat. Bk.*, just above, at p. 354, this Court said that "the considerations that militate against finding a repeal of the anti-trust laws by implication from the existence of a regulatory scheme also argue persuasively against attenuating, by postponing, the courts' jurisdiction to enforce those laws."

The doctrine of "primary jurisdiction" is judicial in origin (see *United States v. R.C.A.*, quoted at p. 70 below) and development. By consequence its contours are shaped by and follow the reasons which account for its creation, which have guided its development and which justify it. It is not enshrined in hallowed legislative-given words which (if clear) provide the only answers, however far they may depart in their application from the needs to which they originally responded. For proper application of the doctrine it is not enough to look alone to an authoritative text and to devine its meaning,—indeed there is none,—but it is necessary to know its underlying reasons and it is important to know what it is *not*. This is far from original with us. All this this Court has spelled out, repeatedly, in one form or another. (See for examples, *United States v. Western Pac. R. Co.*, quoted at pp. 70, 73 below and *United States v. R.C.A.*, quoted at p. 70 below.)

The doctrine is *not* one that questions responding to its test are for administrative determination alone. It is not to be confused, as is sometimes done, with the doctrine upon which such cases as *Keogh v. C. & N. Ry. Co.*, 260 US 156[65] and *Best v. Humboldt Placer Mining Co.*, 371 US 334, rest. Such cases must be put to one side. The distinction is pointedly made in *United States v. Western Pac. R. Co.*, 352 US 59, 63:

65. Mr. Justice Brandeis was the author of the opinion in *Keogh* as well as in *Great Northern v. Merchants Elevator*, p. 68 above and the two opinions were only 5½ months apart. He was not confusing the two doctrines.

"The doctrine of primary jurisdiction, like the rule of requiring exhaustion of administrative remedies, is concerned with promoting *proper relationships between the courts and administrative agencies* charged with particular regulatory duties. *'Exhaustion'* applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. *'Primary jurisdiction'*, on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of and administrative body; in such a case the judicial process is *suspended* pending *referral* of such issues to the administrative body *for its views*.[66] General American Tank Car Corp. v. El Dorado Terminal Co., 308 US 422, 433, 84 L ed 361, 370, 60 S Ct 325."

A leading statement of the doctrine of primary jurisdiction is that of *United States v. R. C. A.*, 358 US 334, 346, where the court said:

"The doctrine originated with Mr. Justice (later Chief Justice) White in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075. *It was grounded on the necessity for administrative uniformity,* and, in that particular case, for maintenance of uniform rates to all shippers. A second reason for the doctrine was suggested by Mr. Justice Bandeis in Great Northern R. Co. v. Merchants Elevator Co., 259 US 285, 291, 66 L ed 943, 946, 42 S Ct 477, where he pointed to the need for administrative skill 'commonly to be found only in a body of experts' in handling the 'intricate facts' of, in that case, the transportation industry.

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66. That the determination made on such referral may be determinative of the court action,—compare *El Dorado Oil Works v. United States,* 328 US 12 with the *General American Tank Car* decision cited in the quotation, and see the language quoted from *United States v. Philadelphia Nat. Bk.*, at p. 72 below,—should not but probably has contributed to confusion of the doctrines of "exhaustion" and "primary jurisdiction."

"Thus, when questions arose as to the applicability of the doctrine to transactions allegedly violative of the antitrust laws, particularly involving *fully regulated industries* whose members were *forced to charge only reasonable rates approved by the appropriate commission,* this Court found the doctrine applicable. United States v. Pacific & A. R. & Nav. Co., 228 US 87, 57 L ed 742, 33 S Ct 443; Keogh v. Chicago & N. W. R. Co. 260 US 156, 67 L ed 183, 43 S Ct 47; United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247; Georgia v. Pennsylvania R. Co. 324 US 439, 89 L ed 1051, 65 S Ct 716; Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492. At the same time this Court carefully noted that the doctrine did *not* apply when the action was only for the purpose of dissolving the conspiracy through which the allegedly invalid rates were set, for in such a case there would be no interference with rate structures, or a regulatory scheme. United States v. Pacific & A. R. & Nav. Co. 228 US 87, 57 L ed 742, 33 S Ct 443, and Georgia v. Pennsylvania R. Co. 324 US 439, 89 L ed 1051, 65 S Ct 716, both supra. The decisions sometimes emphasized the need for administrative uniformity and uniform rates, Keogh v. Chicago & N. W. R. Co. 260 US 156, 67 L ed 183, 43 S Ct 47, supra, while at other times they emphasized the need for administrative experience in distilling the relevant facts in a complex industry as a foundation for later court action. United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247, supra, and Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492, supra, *as explained in* Federal Maritime Board v. Isbrandtsen Co. 356 US 481, 497-499, 2 L ed 2d 926, 937, 938, 78 S Ct 851."

Two other important statements by this Court, both since *Panagra, Pan American World Airways, Inc. v. United States,* 371 US 296, noticed below at p. 89, are in the *Philadelphia Bank Case* and very recently in the *Meat Cutters Case. United States v. Philadelphia Nat. Bk.,* above, at p. 353, said:

"We note finally, that the doctrine of 'primary jurisdiction' is not applicable here. That doctrine requires judicial abstention in cases where *protection of the integrity of a regulatory scheme* dictates *preliminary* resort to the agency which administers the scheme. See Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492; Great Northern R. Co. v. Merchants Elevator Co. 259 US 285, 66 L ed 943, 42 S Ct 477; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv L Rev 436, 464 (1954). *Court jurisdiction is not thereby ousted,* but only postponed. See General American Tank Car Corp. v. El Dorado Terminal Co. 308 US 422, 433, 84 L ed 361, 370, 60 S Ct 325; Federal Maritime Board v. Isbrandtsen Co. 356 US 481, 498, 499, 2 L ed 2d 926, 937, 938, 78 S Ct 851; 3 Davis, Administrative Law (1958), 1-55. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies, the present action would not be barred for the agency proceeding was completed before the antitrust action was commenced. Cf. United States v Western P. R. Co. 352 US 59, 69, 1 L ed 2d 126, 135, 77 S Ct 161; Retail Clerks International Asso. v. Schermerhorn, 373 US 746, 756, 10 L ed 2d 678, 685, 83 S Ct 1461. We recognize that the practical effect of applying the doctrine of primary jurisdiction has sometimes been to channel judicial enforcement of antitrust policy into appellate review of the agency's decision, see Federal Maritime Board v Isbrandtsen Co. 356 US 481, 2 L ed 2d 926, 78 S Ct 851, supra; cf. D. L. Piazza Co. v. West Coast Line, Inc. 210 F2d 947 (CA2d Cir 1954), or even to preclude such enforcement entirely *if* the agency has the power to approve the challenged activities, see United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247; cf. United States v. Railway Express Agency, Inc. 101 F Supp 1008 (DC D Del 1951); but see Federal Maritime Board v. Isbrandtsen Co. 356 US 481, 2 L ed 2d 926, 78 S Ct 851 supra."

And by the same token when Congress has determined that only approved agreements are exempted from the antitrust statutes it has determined what is necessary for protection of the integrity of the regulatory scheme, at least where the question is *not* of conduct in the future which the administrative agency can still act to exempt.

In the *Meat Cutters Case, Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America v. Jewel Tea Co., Inc.,* 381 US 676, 14 L ed 2d 640, 646, 85 S Ct 1596 this Court quoted part of the language quoted at p. 70 above from *United States v. Western Pac. R. Co.* and for the rest of its desired statement quoted other of its own language:

> "The doctrine is based on the principle 'that in cases raising issues of fact not within the conventional experiences of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over,' *Far East Conference v. United States,* 342 U. S. 570, 574, and 'requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme,' *United States v. Philadelphia Nat. Bank,* 374 U. S. 321, 353."

The doctrine is not one to reduce the rights of a party either directly or by remitting him to a remedy which will not give him everything that is his due, or to excuse courts from the discharge of their proper functions.[67] To the contrary it is designed only to make the business of governing reasonably efficient in providing the fullest appropriate relief. To again call on *United States v. Western Pac. R. Co.,* above, at p. 64:

> "In every case the question is whether the reasons for the existence of the doctrine are present and whether the

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67. Cf. *California v. Fed. Power Com'n,* p. 77 below and *The American Ship Building Co. v. N.L.R.B.,* p. 78 below.

> purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the *desirable uniformity* which would obtain if initially a specialized agency passed on *certain* types of administrative questions. See Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 US 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed."[68]

It should result, *and it has resulted,* that where the reasons for application of the doctrine are not present the court *must* proceed in ordinary course with its regular business. (*California v. Fed. Power Com'n,* p. 77 below.) The leading case on the limitations of the doctrine and its non-application where the question is one of law, traditionally for the courts and on which uniformity can be achieved through the courts, is the frequently cited and quoted case, *Great Northern R. Co. v. Merchants Elevator Co.,* p. 68 above. That, like this, was an over-charge case. The question was one of construction of a tariff, not calling for any expert appraisal of complicated accounting data (as in *U. S. v. Western Pac. R. Co.,* above), and *was one of law.*[69] No resort to the Commission was required in order to obtain uniformity. (See acc. *W. P. Brown etc. Co. v. L. & N. R. Co.,* 299 US 393) Holding that the court could proceed without prior resort to the Commission this Court said:

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68. In *Great Northern R. Co. v. Merchants Elevator Co.,* 259 US 285, 291, in language which frequently has been quoted, and which was relied on in *Cunard* itself, it was said that preliminary resort to the Commission "is required because the inquiry is essentially one *of fact and of discretion in technical matters and uniformity can be secured only if its determination is left to the Commission.*"

69. Here the most that can be claimed is the construction of a contract, a typical question of law for a court. *Cf. New York, Susquehanna etc. Co. v. Follmer,* 254 F2d 510, 513 (Cir. 3). Cf. *Packaged Programs v. Westinghouse Broadcasting Co.,* 255 F2d 708 (Cir. 3).

"It is true that uniformity is the paramount purpose of the Commerce Act. But it is *not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission* to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of Federal law. If the parties properly preserve their rights, a construction given by any court, whether it be Federal or state, *may ultimately be reviewed by this court, either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured.*" (P. 290)

This language was quoted and applied in *Pan American Pet. Corp. v. Superior Court,* 366 US 656, 665, where the court brushed aside the claim that state court decisions of federal questions might destroy uniformity saying that "the right to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions."

Very recently, in the *Meat Cutters Case,* p. 73 above, this Court said:

"Nevertheless, for the reasons stated below we cannot conclude that this is a proper case for application of the doctrine of primary jurisdiction.

"To begin with, courts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment. Just such a determination must be frequently made when a court's jurisdiction to issue an injunction affecting a labor dispute is challenged under the Norris-LaGuardia Act, which defines "labor dispute" as including "any controversy concerning terms or conditions of employment," Norris-LaGuardia Act § 13 (c), 27 Stat. 73, 29 U. S. C. § 113(c) (1958 ed.). See *Order of Railroad Telegraphers v. Chicago & N. W. R. Co.,* 362 U. S. 330; *Bakery Sales Drivers Local v. Wagshal,* 333 U. S. 437; cf. *Teamsters Union v. Oliver,* 358 U. S. 283.

"Secondly, *the doctrine of primary jurisdiction is not a doctrine of futility;* it does not require resort to 'an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency.' *Federal Maritime Board v. Isbrandtsen Co.,* 356 U. S. 481, 521 (Frankfurter J., dissenting)."

Secondly, where (as here) there is no action which could be taken by the Commission which would be of any aid to the court, there is no room for application of the primary jurisdiction doctrine. (Cf. *U. S. v. The Philadelphia Nat. Bk.,* above.) So where the matter has been passed upon by the Commission, no further Commission action is needed and there is no reason why the court should not proceed forthwith. *U. S. v. Western Pac. R. Co.,* 352 US 59, 69, said:

"Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it."[70]

The court cited *Crancer v. Lowden,* 315 US 631, which was just such a case. There having been a prior construction by the Commission, *Crancer* held that the court action might proceed even though there was a second proceeding then pending before the Commission because:

"Nothing involved in the pending administrative proceeding before the Interstate Commerce Commission was *essential* to the determination of the issue in this suit."

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70. Compare holding that a Clayton Act § 4 treble damage action should proceed and quoting and applying this language where "The flip system thus already has achieved both an administrative and a court status of illegality. From this it follows * * * (2) that there is no need for further administrative expertise on this issue; and (3) that the problem of uniformity, so often troublesome and persuasive in rate cases, is not present." (*McCleneghan v. Union Stock Yards Co.,* 298 F2d 659, 668 (Cir. 8))

Thirdly, the only administrative action on which a court should wait, is *lawful* action. This results logically and from the holding in *Penn. R. Co. v. United States,* 363 US 202, that if a stay of court proceedings waiting upon administrative action was proper, that stay should remain in effect until the administrative proceeding was *finally* determined by the conclusion of all review proceedings.

It follows from the foregoing, and, indeed, this is the holding of the cases, that where an administrative agency can take no action (*Georgia v. Penn. R. Co.,* 324 US 439; the *Meat Cutters Case,* 381 US 676, 14 L ed 2d 640, 648[71]) or can not give *all* the relief to which a party is entitled the courts are free to entertain an action. (*Hewitt-Robins, Inc. v. Eastern Freight-Ways Inc.,* 371 US 84;[72] *Panagra,* 371 US 296, note 19.[73])

Finally, all of the earlier cases, *Cunard* and *Far East Conference* included, must be read as limited by *California v. Federal Power Commission,* 369 US 482, and its holding that antitrust issues are *not* administrative matters unless made so by the regulatory statute, and that when not made matters for administrative handling (or at least involving such matters) the courts must proceed to their determination:

71." '[W]e know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose.' *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co.*, 341 US 246, 254 95 Led 912, 920, 71 SCt 692."

72. *Pensick & Gordon, Inc. v. California Motor Express,* 302 F2d 391 (Cir. 9); remanded "for further consideration in the light of *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.,*" 371 US 184; 323 F2d 769 (Cir. 9) remanding to the District Court to proceed to the merits, cert. den. 375 US 984.

73. "If it were clear that there was *a* remedy in this civil antitrust suit that was *not available* in a § 411 proceeding before the C. A. B., we would have the kind of problem presented in Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 US 84, where litigation is held by a court until the basic facts and findings are first determined by the administrative agency, *so that the judicial remedy not available in the other proceedings, can be granted.*"

Cf. *Heisler v. Parsons,* 312 F2d, 172, 176 (Cir 7); *U. S. v. Research Laboratories,* 126 F2d 42, 45, col 2 (Cir 9).

"Here, as in United States v. Radio Corp. of America, 358 US 334, while 'antitrust considerations' are relevant to the issue of 'public convenience and necessity' (id. 358 US at 351), there is no 'pervasive regulatory scheme' (ibid.) *including the antitrust laws* that has been entrusted to the Commission. And see National Broadcasting Co. v. United States, 319 US 190, 223, 87 L ed 1344, 1366, 63 S Ct 997. Under the Interstate Commerce Act, mergers of carriers that are approved have an antitrust immunity, as § 5(11) of that Act specifically provides that the carriers involved 'shall be and they are hereby relieved from the operation of the antitrust laws. . . .' See McLean Trucking Co v. United States, 321 US 67, 88 L ed 544, 64 S Ct 370.

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"It is not for us to say that the complementary legislative policies reflected in § 7 of the Clayton Act on the one hand and in § 7 of the National Gas Act on the other should be better accommodated. *Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency.* Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075. *The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to courts is in practical effect taken over by the Federal Power Commission.*"

Compare *The American Ship Building Co. v. N.L.R.B.*, 379 US 814, quoted at p. 28 above and note 24, p. 28 above.

These cases give real point to the *caveat* of *United States v. Western Pac. R. Co.*, 352 US 59, 69:

"No fixed formula exists for applying the doctrine of primary jurisdiction. *In every case the question is whether the reasons for the existence of the doctrine are present* and whether the purposes it serves will be aided by its application in the particular litigation. * * * We adhere to the distinctions laid down in *Great Northern R. Co. v. Merchants Elevator Co.*,

supra, which calls for *a decision based on the particular facts of each case.*"

Under these cases the District Court should have proceeded to the determination of the claim of Petitioner, Carnation Company. There were no questions presented calling for special knowledge or expertise. The only possible questions were the meaning of agreement No. 8200, a typical question for courts (*Great Northern R. Co. v. Merchants Elevator Co.,* above), whether the unapproved secret side agreement was made and whether the raise in rate of $2.50 per ton was made and kept in effect under it. These are typical antitrust questions. Whether the secret side agreement was or was not approved is likewise one for the court under *United States v. Borden Co., Socony-Vacuum, Kempner v. FMC,* 313 F2d 586 (Cir. Dist. Col.), c.d. 375 US 813 and the other cases, p. 63 ff above. If it was not approved there is no action the Commission can now take to affect Petitioner's rights to some relief, any more than it could retroactively wipe away the criminal stains of the defendants' unlawful conduct. Not only can the Commission not award the full relief to which Petitioner is entitled but if the court does so its money award will no more upset any statutory scheme than would the award of reparations by the Commission and here, where there is no question of what a reasonable rate would be but only whether the increase of $2.50 per ton was illegal, there is no more likelihood of different results as between different shippers with jury trials in Clayton Act § 4 actions than with jury trials under Shipping Act, 1916 § 30. If the results turn out to be not entirely consistent, but still sustainable, that must be laid to the workings of the Seventh Amendment. Neither acts of Congress nor judicial doctrine can override its demands.

The short of the case appears in this language from *United States v. R.C.A.,* above p. 70, at p. 350:

"Thus, there being no pervasive regulatory scheme, and no rate structure to throw out of balance, sporadic action by federal courts can not work mischief. The justification for primary jurisdiction accordingly disappears."

2. Cunard, Far East Conference, Isbrandtsen and Panagra

It remains to consider *Cunard* and *Far East Conference* (a) in the light of the rule that they are not to be read more widely than their facts require, both under the general rule of interpretation of judicial decisions[74] and under the special rule in this field that the Court is not making broad general holdings but is making its decisions "based on the particular facts of each case" (*United States v. Western Pac. R. Co.*, p. 79 above), (b) to consider them "as explained in *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481, 497-499." (to borrow the language from *United States v. R.C.A.*, quoted at p. 71 above) and (c) to consider them in view of the holding in *Panagra* and its very careful excising from that holding of a number of matters including that now presented, the availability of Clayton Act § 4 treble damage civil actions based on activities of defendants in regulated industries (see p. 91 below).

U. S. Nav. Co. v. Cunard S.S. Co., 284 US 474, was an action by a steamship company against competitors for *injunctive relief* against claimed violations of the Sherman Act,—a conference scheme of dual rate contracts, by which 2 rates were set up and a shipper who agreed to use exclusively conference bottoms could obtain the lower rate, etc. It was held that the district court properly dismissed the action.

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74. The settled rule is that language of a decision is not to be given a wider reading than is called for by the question that was presented for decision. (*Cohen v. Virginia*, 6 Wheat. (US) 264, 399, quoted, among other places in *Osaka etc. Line v. U. S.*, 300 US 98, 103; *German Alliance etc. v. Home etc. Co.*, 226 US 220, 234; *Puerto Rico v. Shell Co.*, 302 US 253, 269.)

The court said that only a few cases need be noted and started with extended quotation from *Great Northern R. Co. v. Merchants Elevator Co.*, p. 68 above, a case that involved "no question of fact, either as an aid to the construction, or in any other respect, and no question of administrative discretion". It then noticed the coverage of the Shipping Act, and that carriage by water "involves questions of exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge" and may depend on facts peculiar to the business or its history "unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced". [This well might be true of the propriety of a dual-rate structure (*sed quaere* under *Isbrandtsen Co.,* 356 US 481, below) but it is certainly not true of whether there was an antitrust conspiracy to fix prices.] The opinion further said that the charges made "either constitute direct and basic charges of violations" of the Shipping Act or are "so interrelated with such charges as to be in effect a component part of them". It was held, and the exact language of the court should be carefully noticed, that:

> "the remedy is that afforded by the Shipping Act, which to *that extent* supersedes the anti-trust laws."

This remedy might well be complete where only relief as to the future is sought because under § 22 a cease-and-desist order could be issued and under § 29 could be enforced directly. Since no relief was sought for *past* acts, but *only in respect to prospective conduct*, failure to file the agreement "will not afford ground for an *injunction*" for the Board was "fully authorized by § 22, supra, to afford relief upon complaint or upon its own motion". There is no language here of repeal, expressly or by implication, nor is there any statement of complete exclusion of the antitrust laws.

It is only "to that extent" that the antitrust laws are superseded.[75]

It was argued that the agreement referred to in the complaint was one which could not be approved. To this the court answered "But this is by no means clear" and went on to spell out reasons for believing that there was room for action by the administrative agency.

Nothing in *Cunard* stands as an impediment to court action where, as here, the only question is one of law, and there is no action which the Commission could take which would resolve any issue tendered to the court, the matter presented rests in the past, within the traditional functions and competency of a court and does not require for its resolution any "expertise" and granting of relief by an award of damages will not be so disruptive of the Shipping Act scheme that moritorium legislation will be needed.[76] *Cunard* is explained fully by "the particular facts" of that case. The case, whether right or wrong in view of *Isbrandtsen*, 356 US 581, goes on the ground that an *injunction* would have interfered with the performance by the Board of its functions *in respect of the very matters complained of*, and in this at least history has shown that the court was correct.[76] And *Isbrandtsen*, if it does nothing else, demonstrates that the Commission is not given the last word on matters that may fall within the Act and that the doctrine that *Cunard* was applying was the "primary jurisdiction doctrine", as it has been fully explained by the cases; that it was the nature of the question there involved that warranted referral to the Commission. There the Commission could act,

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75. The same language is italicized by *S. S. W., Inc. v. Air Transport Ass'n*, 191 F2d 658, 661 (Cir Dist Col), when it quotes *Cunard*, a matter of significance since *S. S. W.* made a distinction between injunctive relief and relief by way of treble damages and concluded that by the Civil Aeronautics Act "Congress did *not intend to deprive an air carrier of its right to seek treble damages for violation of the antitrust laws*" a conclusion which now seems unassailable in view of *Hewitt-Robins v. Eastern Freight-Ways*, 371 US 84 and *Panagra*, p. 89 ff below.

76. See footnotes 16 and 40 pp. 15 and 41 above.

its action could achieve all of the results an action for an *injunction* could achieve and *injunction* granted to one suitor, with its prospective operation, might seriously disrupt the future working of the statutory scheme or be only an idle act if Commission action could nullify it. The point to be seized is that there is a vast difference between prospective relief in specie and an award of damages for past conduct in violation of the antitrust statutes into which no amount of Commission action could breathe legality. It is believed, with deference, that it is here the court below fell into error. This is indicated by its repeated references (R 167 (end of note 10), 173, note 19 at p. 175, 176, 187) to the language of *Cunard,* that "it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications." However proper such reasoning may have been in *Cunard* where the whole problem looked only to the future it has no proper place in this case.[77] Approval could not work retroactively to cure the illegality (*River Plate etc. Conference v. Pressed Steel etc. Co.,* 227 F2d 60 (Cir. 2); cf. *Kempner v. FMC,* 313 F2d 586 (Cir. Dist. Col.), c.d. 375 US 813) any more than if the Government were prosecuting criminally (see *Panagra,* below).

Far East Conference v. United States, 342 US 570, was an action by the United States to *enjoin* violation of the Sherman Law. Again the attack was on a dual rate system. As in *Cunard* the *only* relief asked was *prospective* in operation and might interfere with Board action. Resting on primary jurisdiction and *Cunard,* the court held that the issue should first go to the Board. Its explanation of *Cunard* is interesting and makes it clear that

77. The court below, in the next to the last paragraph of its opinion (R 187), again quotes this language from *Cunard* and in immediate sequence adds: "We would assume that if such action were taken by the Commission no antritrust proceedings would be in order." But the Shipping Act, 1916, has not authorized, if it could, retroactive approvals which will wash out past antitrust violations.

Cunard was *not* a case of repeal or sole remedy, but only of prior application. Indeed, *Cunard* really so explains itself by its reliance on *Great Northern v. Merchants Elevator. Far East* said of *Cunard:*

> "The Court thus applied a principle, now firmly established, that in cases raising issues of fact *not within the conventional experience of judges* or cases requiring the exercise of administrative *discretion,* agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence *serve as a premise for legal consequences to be judicially defined.*"

There is nothing to indicate that the doctrine there applied would operate where the question presented is solely one of law, or where there is nothing which the administrative agency can do to affect the result, where the court is concerned only with past conduct and where no relief sought will embarrass future Commission action. *Far East* was only applying a doctrine which would *suspend* court action to allow the administrative agency to act *if* there were an "administrative question", the court then to act if there was *further* relief *to which the plaintiff was entitled.* Any doubt about this is resolved by the reasons given for holding that in the circumstances of *that particular case* as it *then* presented itself, the action should be dismissed rather than be held pending Commission action. The court expressly recognized that the problem was *not one of sole or exclusive remedy* but merely one of adjustment by waiting to see what would happen. It said:

> "Having concluded that initial submission to the Federal Maritime Board is required, we may *either* order the case retained on the District Court docket pending the Board's action (citing the two *El Dorado* cases) *or* order dismissal of the proceedings brought in the District Court."

If the *sole* remedy were under the Shipping Act and by the Commission the court had *no* choice to retain or dismiss. It ordered it dismissed only because in the situation then presented action by

the agency might dispose of the matter. However, it expressly recognized that if further relief were necessary *it could be had in a new action.* The Court reasoned:

> "If the Board's order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application. (Citation) We believe that no purpose would here be served to hold the present action in abeyance in the District Court while the proceedings before the Board and subsequent judicial view or enforcement of its order are being pursued. *A similar suit is easily instituted later, if appropriate.*"[78]

There is nothing in the majority opinion which remotely suggests that if there were no effective action which the Commission could take by subsequent approval which would obviate court action the court action should be dismissed or delayed. And, this is just what Mr. Justice Frankfurter, the author of that opinion, in effect said in his dissent in *Isbrandtsen,* 356 US 481.

In the light of later decisions it must be noticed that Mr. Justice Clark did not participate in *Far East* and that Mr. Justice Douglas, with whom Mr. Justice Black concurred, dissented. The point of the dissent was that the dual rate agreement could have been immunized from the operation of the Sherman Act if it had been submitted to the Board and approved.

> "But that exemption from the Sherman Act can be acquired only in the manner prescribed by § 15. Here no effort was made to obtain it. Hence the petitioners are at large, subject to all of the restraints of the Sherman Act.
>
> "Why should the Department of Justice be remitted to the Board for its remedy? The Board has no authority to enforce the Sherman Act. * * *.

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78. As to suspension rather than dismissal being the appropriate remedy see *General American Tank Car Corp. v. El Dorado Terminal Co.,* 308 US 422 and its citation in *United States v. Western Pac. R. Co.,* p. 70 above; *Mitchell Coal & Coke Co. v. Penn. R. Co.,* 230 US 247; *McClenghan v. Union Stock Yards Co.,* 298 F2d 659, 670 (Cir. 8); *Panagra,* quoted in note 82 at p. 90 below.

"Petitioners, therefore, operate outside the law not only because they have failed to submit their schedule of rates to the Board but also because the rates adopted would, if approved, be illegal."

To this last statement is added a footnote: "There is less room for expertise for the rates used by the steamship companies are unfiled rates or unlawful rates." The opinion concludes:

"The jurisdiction of the Department of Justice must commence at this point, unless we are *to amend the Act by granting an anti-trust exemption* to rate fixing not only when the rates are filed by the companies and approved by the Board *but also when they are not filed at all or are rates which, if filed, could not be approved. I would read the Act as written and require the steamship companies to obtain the anti-trust exemption in the precise way Congress has provided.*"

This is sound doctrine under *United States v. Borden Co.*, p. 64 above.

The significance of this language from the dissent will become more apparent when *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481 is considered, particularly as the holding is pointed up by the dissent of Mr. Justice Frankfurter who wrote the majority opinion in *Far East Conference.*

Federal Maritime Board v. Isbrandtsen Co., 356 US 481, is the next chapter although that was not a primary jurisdiction case but one of direct review of a Board order. The dual rate structure was again under attack. The Federal Maritime Board had approved a system. Isbrandtsen Co. initiated review and the Court of Appeals set aside the Board's order on the ground that the system was illegal *per se.* This Court affirmed. The argument that the decision was foreclosed by *Cunard* and *Far East Conference* was rejected. The Court stated the holding of *Cunard* to be that

"the questions raised by this complaint were within the primary jurisdiction of the Shipping Board and therefore the court could not entertain the suit *until* the Board had considered the matter."

It said that *Far East Conference* was a similar holding. *There is no suggestion that either case was a sole remedy case.* Both cases are reviewed and quoted and the court then continues:

> "It is, therefore, very clear that these cases, while holding that the Board had primary jurisdiction to hear the case *in the first instance*, did not signify that the statute left the Board free to approve or disapprove the agreements under attack. Rather, those cases recognized that in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed. Compare Denver Union Stock Yard Co. v. Producers Livestock Marketing Asso. 356 US 282, 2 L ed 2d 771, 78 S Ct 738. It is recognized that the courts, while *retaining the final authority to expound the statute*, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern. Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation.
>
> "Thus the Court's action in Cunard and Far East Conference *is to be taken as a deferral* of what might come to be the ultimate question—the construction of § 14 Third—rather than an implicit holding that the Board could properly approve the practices there involved. The holding that the Board had primary jurisdiction, in short, was *a device to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court* of the scope and meaning of the statute as applied to those particular circumstances."

This is the explanation of *Cunard* and *Far East* which was thought important enough to be called to attention in *United States v. R.C.A.*, quoted at p. 71 above.

In his dissent Mr. Justice Frankfurter, citing *Cunard* and *Far East,* said that the Court had twice rejected the contention which it now accepts. Speaking of those cases he too recognized that "the immediate issue in both cases was, of course, the applicability of the principle of 'primary jurisdiction' ". But he objected to the present holding because, so he said, those cases were not designed to give courts jurisdiction "on condition that they use the administrative agency as a sterile conduit to them." He is saying that the doctrine of those cases did not contemplate the necessity of going to the administrative agency *where there was nothing the administrative agency lawfully could decide.* He made this explicit further saying:

> "Contrariwise, where a decision of a case depends on *determination of a question of law as such,* either because of explicit statutory outlawry of some specific conduct or by necessary implication of judicial power because not involving the exercise of administrative discretion or the need of uniform application of specialized competence, *the doctrine of primary jurisdiction has no function, because there is no occasion to refer a matter to the administrative agency.* Great Northern R. Co. v. Merchants Elevator Co. 259 US 285, 66 L ed 943, 42 S Ct 477 (reaffirmed in United States v. Western Pacific R. Co. 352 US 59, 69, 1 L ed 2d 126, 135, 77 S Ct 161); Texas & P. R. Co. v. Gulf, C. & S. F. R. Co. 270 US 266, 70 L ed 578, 46 S Ct 263; Civil Aeronautics Board v. Modern Air Transport, Inc. (CA2NY) 179 F2d 622, 624; see Davis, Administrative Law 666-668."

And then Mr. Justice Frankfurter said even more significantly:

> "It would be a travesty of law and an abuse of the judicial process to force litigants to undergo an expensive and merely delaying administrative proceeding *when the case must eventually be decided on a controlling legal issue* wholly unrelated

> to determinations for the ascertainment of which the proceeding was sent to the agency."[79]

This reasoning has been approved by quotation in the *Meat Cutters Case*, p. 76 above. What the author of the opinion in *Far East Conference* then points up is the significance of the dissent in *Far East Conference:*

> "And in Far East Conference, the claim that now prevails was a main ground of dissent."

These cases in effect find their summing up in the holding and exception in *Panagra, Pan American World Airways v. United States*, 371 US 296. This was a civil suit by the United States for *injunctive* relief charging violations of the Sherman Act in what amounted to division of territory and routes and monopoly in foreign air commerce with South America, presenting what the court characterized as "narrow questions" which, by the Civil Aeronautics Act superseded in 1958 by the Federal Aviation Act, 49 USC § 1301 ff, had been entrusted, so the Court held, to the Civil Aeronautics Board.[80]

> "Limitation of routes and division of territories and the relation of common carriers to air carriers are basic in this regulatory scheme.[81] The acts charged in this civil suit as anti-trust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending or rejecting them, and in allowing or disallowing affiliations between common carriers

79. Indeed, he says that to require resort to the Commission on a question which the court can decide *as a matter of law* "is a form of playfulness" and in such case resorts to the Commission are "utterly wasteful futilities." Cf. the *Meat Cutters Case*, quoted at p. 76 above.

80. The Court said that the legislative history indicated that the "Board was to have broad jurisdiction over air carriers, insofar as most facets of federal control are concerned."

81. Contrast the case at bar which has to do with fixing rates which is no part of the Commission's authority. (See p. 34 above)

82. In *U. S. v. Philadelphia Nat. Bk.*, 374 US 321, the court indicated that what was said in the language just quoted was basic to the decision of the case and stated that *Panagra* held that because the Board "had been given broad" powers to enforce the competitive standard clearly delineated

and air carriers.[82] The case is therefore quite unlike Georgia v. Penn R. Co., 324 US 439 * * * in view of the fact that the Interstate Commerce Commission had no power to grant relief[81] * * *"

Under the Civil Aeronautics Act the "industry has been regulated to a regime designed to change the prior competitive system"; "limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme"; "Congress has committed the regulation of this industry to an administrative agency of special competence that deals only with the problems of the industry" and it, "in regulating air carriage is to deal with at least some antitrust problems."[83] It was said that the "regime" of the statute "has its special standard of the 'public interest' as defined by Congress" and "it would be strange indeed if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations". The Court reinforced its conclusion by pointing out that not only had "the narrow questions presented by this complaint been entrusted to the Board" but that they presented problems that were beyond the field of judicial action and strange to judicial competency for

"many of the problems presented by this case, which involves air routes to and in foreign countries, may involve military

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by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied "to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers." Indeed, in *Panagra* itself, footnote 19, the court said:

"If it were clear that *there was a remedy in this civil antitrust suit that was not available in a § 411 proceeding before the C.A.B., we would have the kind of problem presented in Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 US 84, 9 L ed 2nd 142, where litigation is held by a court until the basic facts and findings are determined by the administrative agency, *so that the judicial remedy not available in the other proceeding, can be granted.*"

83. "Pooling and other like arrangements are under the Board's jurisdiction by reason of §412. Any persons affected by an order under §§ 408, 409 and 412 is 'relieved from the operation of the "antitrust laws",' including the Sherman Act. § 414. The Clayton Act, insofar as it is applicable to air carriers, is enforceable by the Board."

> and foreign policy considerations that the Act, as construed by a majority of the Court in Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp., 333 US 103, 92 L ed 568, 68 S Ct 431, *subject to presidential, rather than judicial review.* It seems to us, therefore, that the Act *leaves to the Board under § 411 all questions of injunctive relief* against the division of territories or the allocation of routes or against combinations between common carriers and air carriers."

There was such an overlapping with the antitrust statutes that *injunctive* action by the courts could very well result in a head-on conflict with the scheme of the Civil Aeronautics Act and the functioning of the Board to the point where action by the courts "would in effect deprive the subsequent statute of its efficacy" and "render its provisions nugatory". (Cf. p. 50 above) The Court was careful to point out "that the power of the Board to issue a 'cease and desist order' " was broad enough "to compel divestiture" for "where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil at hand."[84] But the Court was very careful expressly to point out that to the extent the subject was *not* governed by the Aviation Act and remedies under that Act were *not* so broad as to give *all of the relief that could be obtained under the antitrust statutes,* the antitrust statutes were *not* superseded.

The Court said:

> "No mention is made of the Department of Justice and its role in the enforcement of the antitrust laws, yet we hesitate here, as in comparable situations, to hold that the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws—*absent an unequivocally declared congressional purpose so to do.* While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, *those expressly entrusted to*

84. See note 82 above.

it encompass only a fraction of the total. Apart from orders which give immunity from the antitrust laws by reason of § 414, the whole criminal law enforcement problem remains unaffected by the Act. Cf. United States v. Pacific & A.R. & N. Co., 228 US 87, 105 L ed 742, 748, 33 S Ct 443. *Moreover, on the civil side violations of antitrust laws other than those enumerated in the Act might be imagined.* We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce."

We suggest, with deference, that in *Panagra* this Court has made for us the distinction we are endeavoring to make between this case and *Cunard* and *Far East Conference* and that whether or not, in the light of *Isbrandtsen Co.*, 356 US 481, they would be decided the same way today, they do not apply here.

3. United States v. Borden Co. and Great Northern v. Merchants Elevator Rule This Case, Not Cunard and Far East Conference

It is submitted that *United States v. Borden Co.*, and similar cases (p. 63 ff above) and *Great Northern v. Merchants Elevator*, p. 74 are controlling here. Enough has been said about *United States v. Borden Co.* A few things should be added about *Great Northern v. Merchants Elevator.* That, like this, is a simple overcharge case. Here, as there, there is no question of the reasonableness of the rate. There the claim was simply that too much was charged because the tariff was not properly read. Here it is claimed that too much was charged because a $2.50 per ton increase was illegally imposed.

There is here no claim of discrimination. There is no claim of an unreasonable rate. No such claim could be made under the Shipping Act as to *foreign* commerce. No fact finding is necessary to know what the "lawful" rate was.

PWC was formed under approved Agreement No. 57 *for the purpose of fixing rates* for its members from Pacific Coast ports to the Far East. Under that agreement, PWC *did in fact, in 1951, fix the rates for evaporated milk* to the Philippine Islands. These were the only lawful rates. Pursuant to the 1953 illegal combina-

tion and agreement, the defendants (not PWC) agreed that there should be collected *$2.50 per ton more than the rate lawfully fixed by PWC. This was in fact done.* The relief sought is the recovery of the amount of this *overcharge* trebled because it was exacted as a result of violation of the antitrust statutes. There is no question of fact, or of administrative discretion for the Commission, or any question not familiar in any antitrust suit. (See, among others, the *Meat Cutters Case*, pp. 75, 76, above; *McCleneghan*, note 70, p. 76 above; *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F2d 708 (Cir. 3); *New York, Susquehanna etc. R. Co. v. Follmer*, 254 F2d 510 (Cir. 3).)

There is far less in the Shipping Act as an impediment to an action to collect an unlawful overcharge in *foreign* commerce than there is in the Interstate Commerce Act. It is established that even where the Interstate Commerce Act applies resort need not be had to the Commission, an action can be maintained to collect an overcharge, certainly where there is no question of construction of a tariff and the claim is merely of collection of $2.50 per ton more than the amount specified in the lawful tariff (*Penn. R. Co. v. Int. Coal In. Co.*, 230 US 184; *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285; *Ingalls v. Maine C. R. Co.*, 24 F2d 113 (D. Me.). Cf. *Pan American P. Corp. v. Superior Court*, 366 US 656; *Crancer v. Lowden*, 315 US 631; *Turner etc. Co. v. Chicago etc. Ry. Co.*, 271 US 259, 262; *St. Louis etc. Co. v. Hasty & Sons*, 255 US 252, 256; *Davis v. Parrington*, 281 Fed 10, 14 (Cir. 9) and the following undercharge cases: *Chesapeake etc. R. Co. v. International Harv. Co.*, 272 F2d 139, 142 (Cir. 7); *U. S. v. Louisville & N. R. Co.*, 221 F2d 698, 703 (Cir. 6); *Bernstein etc. Co. v. Denver etc. R. Co.*, 193 F2d 441, 444 (Cir. 10)). If the illegality springs from violation of the antitrust statutes the source of the illegality is traditionally justiciable and not administrative (*California v. F. P. C.*, above).

This is even a simpler case than *Great Northern R. Co. v. Merchants Elevator Co.* In that case there was a question of construction of a tariff. There was no need to resort to the

Commission because that was a question of law. *In the case at bar there is no need for construction of a tariff at all.* We make a case *without regard for the tariff terms,* because *we are concerned only with the illegal charge of $2.50 per ton above the lawful tariff whatever that tariff is.* (Cf. *Davis v. Parrington,* above p. 93, where the short haul charge was more than for a long haul and this was lawfully only by Commission permission.) But if our case presented a new question, to be tested, step by step, for application of the primary jurisdiction doctrine it meets every test for rejection of the doctrine and denial of the defendants' motions. There is no question of fact calling for handling of peculiar or complicated industry facts or practices or the assembly and appraisal of a mass of statistical or other data. There is no question of reasonableness or discrimination. The only possible questions (if indeed *any* issue can be made—the facts are matters of records) are these:

1. Was there an agreement, as alleged, to fix rates not in the way provided in the PWC agreement No. 57, but by all the defendants;—was there a "side" "combination" or "conspiracy" as alleged? This is the sort of question courts traditionally handle under the antitrust statutes. (Cf. *Anglo Canadian S. Co. v. United States,* 264 F2d 405, 414 note 15 (Cir. 9)).

2. If there were such an agreement or combination was it approved? This is a simple yes or no question. It was not approved.

3. If the agreement was not approved was it illegal? This, as to price and rate fixing, is not a question of fact but one of law. Such agreements are illegal *per se.* (See p. 6 above). This is settled. *Georgia v. Penn. R. Co.* settles it that even a mere veto power over a change in rates falls within the rule.

4. Was the plaintiff damaged and if so in what amount? Again there is no administrative question. It is a typical antitrust suit (Clayton Act § 4) question. The lawful rate was raised $2.50 per ton by the illegal arrangement.

These are all questions for courts.

The Meat Cutters Case, p. 75 above;

Great Northern v. Merchants Elevator, p. 92 above;

Trans World Airlines v. Hughes, 332 F2d 602, 609 (Cir. 2), cert. gr. and dis. as improv. granted;

New York, Susquehanna, etc. Co. v. Follmer, 254 F2d 510 (Cir. 3);

Packaged Programs, p. 93 above; *McCleneghan*, note 70, p. 76 above;

River Plate Conference, p. 96 below.

There is no possibility that the granting of relief in this case will work any want of uniformity of rate or will interfere with the operating of the Shipping Act or the Commission's functioning under it. Rather the case is like one of a charge over and above a Commission approved rate under the Interstate Commerce Act or like an overcharge over the only published and hence the only lawful rate under that Act. Such relief can always be given by the courts. This Court pointed out in the *Meat Cutters Case* that though a question may be one which a "Board frequently determines" it may be one as to which "courts are themselves not without experience." Such questions provide no reason for bypassing the judicial function.

4. Other Cases Under the Shipping Act

There should be considered the few decisions of other courts involving the Shipping Act and unapproved agreements and a few cases sometimes cited but which really have no bearing.

Isbrandtsen Co. v. United States, 211 F2d 51 (Cir. Dist. Col.), c.d. 347 US 990. The Japan-Atlantic and Gulf Freight Conference filed with the Federal Maritime Board a proposed dual rate schedule. The Board issued an order permitting the proposed dual rate to go into effect in 48 hours. The order was set aside and an injunction issued until the Board approved the agreement.

Attention was called to the Interstate Commerce Act where rates go into effect upon filing.

> "In marked contrast, as we have seen above, the Shipping Act which governs here contemplates *an entirely different scheme of regulation.* It makes orders with respect to agreements unlawful until approved. This pre-approval illegality stems from the fact that the Shipping Act specifically provides machinery for legalizing *that which would otherwise be illegal under the anti-trust laws.* The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinizes the agreement to make sure that the conduct thus legalized *does not invade the prohibitions of the anti-trust laws any more than is necessary* to serve the purposes of the regulatory statute.[85] *But until this is done, the agreement is subject to the operation of the anti-trust laws,* under which price fixing agreements are illegal *per se.*"

The court is stating for the Shipping Act the rule now approved by this Court, that where a statute provides a method for obtaining an exemption from the antitrust statutes, the exemption can be obtained only in the way the statute provides. (See p. 62 ff above).

In *Pacific Westbound Conference v. Leval & Co., Inc.*, 201 Ore. 390, 269 P2d 541 defendant shipper violated a dual rate contract and the conference plaintiffs sued. It was held that the dual rate structure did not fall under the Conference Agreement so that Conference Agreement approval carried approval of the dual rate structure. The court said it was impressed by the reasoning in *Isbrandtsen Co. v. U. S.*, 211 F2d 51, 57 (Cir. Dist. Col.), which is quoted, and pointed out that conduct "that would be unlawful under" the antitrust statutes is to be permitted "only under due and proper supervision." Recovery was denied because the contract was unlawful. Will it be suggested that the result is wrong because the Commission had not first determined this simple question of law? The next case holds to the contrary.

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85. See *McLean Trucking* and *Minneapolis & St. L. R. Co.*, p. 63 above.

In *River Plate etc. Conference v. Pressed Steel etc. Co.*, 227 F2d 60 (Cir. 2) decided, it will be noticed, after the decision of the Second Circuit in *American Union Transport,* below, the defendant shipper also failed to comply with an exclusive shipping agreement under a dual rate structure. The defense argued the agreement was illegal, not having been approved by the Board. Summary judgment for the defendant was affirmed. Thereafter plaintiffs moved to stay proceedings pending conclusion of proceedings before the Board and the Board moved to intervene. The motions were denied and summary judgment granted by the same order. Approval *"could not come subsequently, or retroactively,* or by some interpretation of the Board made long after the event." The language of § 15 is "clear and categorical". The contract was clearly unlawful. The court cites *Isbrandtsen Co. v. U. S.*, 211 F2d 51 and *Pacific Westbound Conference v. Leval & Co.*, 201 Ore. 290, and goes on:

> "This case presents no questions for determination by a Board of special competence to which Congress has committed questions requiring administrative expertise. *When all that remains is for the Court to say what the plain words of the statute mean and whether the Board has acted, the doctrine of primary jurisdiction does not apply.*"

The court said that *Cunard* and *Far East Conference* each involved factual issues within the special competency of the Board and pointed out that for the matters presented in those cases the remedies under the Shipping Act (cease-and-desist orders) were "virtually coextensive with those under the antitrust laws" (injunction).

Of the cases looking the other way only one calls for any real attention, *American Union Transport v. River Plate & Brazil Conference,* 126 F Supp 91 (S.D. N.Y.), aff'd 222 F2d 369 (Cir. 2,—per curiam). The only opinion is that of the trial court. The case was said to be a treble damage suit under the antitrust laws. Plaintiff was a freight forwarder. Defendants were members of

a steamship conference. It was alleged that the conference members agreed that no member would pay any brokerage on a particular shipment; that the agreement had not been approved under the Shipping Act and was not excepted from the antitrust laws, but it was also asserted that the agreement was "unlawful under the *decisions, rules and orders issued by the Board* and sustained by the courts." The Board had authority to regulate freight forwarders and brokers and *by a general order it had provided for registration and regulation of freight forwarders and brokers* and had undertaken *to regulate the payment and collection of brokerage.* Accordingly, as one ground of decision, and it would seem a sufficient ground, the court said:

> "Although the court is not asked for injunctive relief, it is not at all clear that judicial intervention in this field even to the extent of trying a case for damages would not interfere with the uniformity of treatment and the regulatory policy of the board based on specialized considerations within its exclusive competence."

As to this the case may be right or wrong, but such a ground of decision is without significance in the case at bar.[86] The court's language did, however, go beyond this. It recognized the strength of the argument in the dissenting opinion in *Far East Conference v. U. S.,* 342 US 570 (p. 85 ff above), but felt bound by "the language of the Supreme Court in the United States Navigation case" (the *Cunard* case) and unable to accept the position of the dissent in *Far East Conference* that want of approval set the matter at large for operation of the antitrust laws, although it said the argument based on the theory of the dissent and the factual distinction that no injunctive relief was being sought "is appealing."

A number of things can be said of this case. In the first place the claim of violation of regulations under the Act and that the

86. The later history of the controversy demonstrates that here was the real heart of the controversy. *American Union Transport, Inc. v. United States and FMB,* 257 F2d. 607 (Cir. 2), c.d. 358 US 828.

case involved consideration of the regulation of forwarders and brokers under the Act distinguishes the case. The opinion does not tell us anything of the factual situation of forwarders and brokers or that absent the alleged unapproved agreement there was any right to brokerage or forwarding charges, or why the agreement was illegal or the basis for computing damages, if any. There is nothing to indicate that the factual situation was the simple one that we have here of an illegal overcharge. But the thing that throws the greatest cloud on the case is that was decided in 1955 and that the courts did not have the benefit of the later decisions of this Court beginning with *Federal Maritime Board v. Isbrandtsen Co.*, p. 86 ff above (decided 1958), which have so thoroughly vindicated and confirmed the position taken in the dissenting opinion in *Far East Conference,* particularly the position that exemption from the antitrust statutes can be obtained under the Shipping Act only by the method provided in that Act, i.e., approved by the Commission, or of the Second Circuit's own opinion *River Plate Conference* p. 97 above. The real difficulty with the opinion is that it reads *Cunard* as a decision establishing a sole remedy theory whereas, the *Federal Maritime Board v. Isbrandtsen Co.* pointed out "the Court's action in Cunard and Far East Conference is to be taken *as a deferral* of what might come to be the ultimate question", an explanation of *Cunard* and *Far East Conference* which the court accepted in *United States v. R. C. A.* (see p. 71 above).

The remaining cases can be disposed of shortly.

Rivoli Trucking Corp. has been a persistent suitor. Its action against *New York S. Ass'n,* 167 F Supp 940 (S.D. N.Y.), and the denial of its application for leave to amend upon the ground that it came too late reported in 167 F Supp 943, add nothing. The action was for treble damages, not based upon an unapproved agreement fixing rates which would be illegal *per se,* but on a claim of "lock-out", improper demurrage charges, etc., unreasonable refusal of admission to piers, etc. The case obviously presented questions of fact as to the reasonableness of regulations

and practices required by the Act to be established. The complaint has no resemblance to the case at bar. If there is anything to the primary jurisdiction doctrine at all *Rivoli v. New York S. Ass'n* was a proper case for it.

United States v. Alaska SS Co., 110 F. Supp. 104 (W.D. Wash. 1952) held that *criminal* proceedings under the antitrust statutes were barred by the Shipping Act. With deference the case is clearly wrong. It is critized in *In re Grand Jury Investigation of the Shipping Industry,* 186 F. Supp. 298, 305 (D.C., Dist. Col.), is drained of all persuasion by the *Panagra* case, particularly the language quoted at p. 91 above, and is obviously out of harmony with *Georgia v. Penn. R. Co.,* above.

Wisconsin & Mich. T. Co. v. Pere Marquette Line Steamers, 67 F2d 937 (Cir. 7), was a typical primary jurisdiction case, where the action was to enjoin proposed steamship operations upon the ground that the ships would be operated as "fighting ships" and the rates to be charged would be "unreasonably low".

Swayne & Hoyt v. Kerr Gifford & Co., 14 F. Supp. 805 (E.D. La.) was another case where an injunction was sought. The nature of the claimed wrongdoing does not appear except from a statement that rights were asserted under the Intercoastal Shipping Act and the Shipping Act. This and the comment that the remedy under Shipping Act § 22 is ample is enough to dispose of the case.

Roberto Hendandez, Inc. v. Arnold Bernstein, etc., 31 F. Supp. 76 (S.D. N.Y.), has no bearing. It was simply a refusal to enforce a Commission reparation order upon the ground it was unsustained. The case has no significance except the holding the Commission does not have the last word, a proposition now thoroughly established by *Federal Maritime Board v. Isbrandtsen Co.,* 356 US 481.

U. S. Trucking Corp. v. American Export Lines, 146 F. Supp. 924 (S.D. N.Y.), is equally wide of the mark. The court, exer-

cising its discretion, refused to issue an injunction which, so it was argued, would be in aid of the jurisdiction of the Commission and to preserve the status quo while the Commission acted. No one was contesting the jurisdiction of the Commission.

The unreported decision in *United States v. Pacific Lumber Co., Inc.,* (N.D. Cal.), was in a case charging a conspiracy among dock owners to deny the use of facilities, except that a single dock could be used by one conspirator. The issue was that of discrimination, unreasonable preference and unreasonable regulations and practices, typical administrative questions under the Shipping Act.

United States v. Borax Consolidated, 141 F. Supp. 396 (N.D. Cal.), was a supplementary proceeding for enforcement of a decree. The agreement involved had been approved. "Thus the rate agreement and acts done pursuant to it are, by the Shipping Act of 1916, exempt from the provisions of the Anti-trust Statutes."

IX.

PETITIONER ASKS LEAVE TO CALL ATTENTION TO COMMISSION PROCEEDINGS

Petitioner asks leave to call the Court's attention to the Commission's Report in the proceedings before the Federal Maritime Commission in its Docket No. 872 entitled Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference, and to the portions of the Commission's Report touching on the matters covered by Petitioner's complaint in this action in order that this Court may be brought up to date. For convenience this material is reproduced in the Appendix to this Brief at p. 52 and following. In doing so Petitioner calls attention to the fact that the Report is not final. The circumstances and reasons for this request are as follows:

Petitioner, in its complaint, to meet a possible question of the statute of limitations, pleaded the concealment of the illegal side agreement for the fixing of rates for PWC members, the operation of that agreement and the fixing of rates under it (Complt. pars. 18-27, R 19-24, and authorities in note 17 p. 17 above). Following the usual pleading practice in such cases Petitioner set out how it discovered the fact, and that it discovered the fact through disclosures in the course of a proceeding before the Federal Maritime Board and its successor (Complt. par. 27, R 23, 24). The defendants, in a motion to dismiss, in intervener's answer and in the affidavit of Thomas Lisi, Secretary of the Commission, also called attention to the proceeding, the order instituting it and Petitioner's intervention in the proceeding (R 26-45). This was the status when the judgment was entered in the District Court.

On August 30, 1963, while the appeal from that judgment was pending in the Court of Appeals for the Ninth Circuit the Commission's examiner filed an "initial decision." Appellees called this to the attention of the Court of Appeals. That Court, in its opinion, noticed that decision and noticed material from that "initial decision"; that after extensive sessions the examiner had filed his "initial decision" and that the issues "included in general the matters and claims" in Petitioner's complaint (R 159, 160). The Court quoted the final paragraph of the report (R 176 note 22—a recommendation which the Commission in its report rejected) and again referred to matters said to appear in that Report (R 184 note 28).

On July 28, 1965, after preparation of this brief was on its way, the Commission served its report made on hearing of exceptions to the "initial decision" of the examiner and, in some respects, departing from it. It is material from this report that we have referred to and set out in the Appendix.

The Commission report is not final as this Brief is prepared for the printer. Under Commission Rules § 502.261 ff (46 C.F.R.

§§ 502.261-502.265) the parties have 30 days after service of the Commission's decision within which to apply for reconsideration. Under the Review Act of 1950, 5 USC § 1031 ff a party aggrieved by a final order has 60 days after entry of the order to file, in the Court of Appeals, a petition to review the order. (5 USC 1034; see *Federal Maritime Board v. Isbrandtsen Co.,* 356 US 481, 482.)

In a case where it is appropriate for a court, under the primary jurisdiction doctrine, to withhold action pending an administrative determination, its action should be withheld till all proceedings for review of the administrative action are ended. (*Penn. R. Co. v. United States,* 363 US 202). Of course, if, as we believe under *United States v. Borden Co.,* 308 US 188, and *Great Northern R. Co. v. Merchants Elevator Co.,* 259 US 285, there is no antitrust issue for the Commission to decide, there is no question properly for the Commission so far as this case is concerned and under *California v. Fed. Power Com'n,* 369 US 482 this case can proceed at once.

CONCLUSION

Petitioner's claim, absent something outside the antitrust statutes, is a classical Clayton Act § 4 treble damage action based upon a price fixing agreement, a *per se* violation of Sherman Act § 1. If there is anything significant outside the antitrust statutes it can be only Shipping Act, 1916 as it applies to foreign commerce upon the theory, urged by defendant-respondents, that since they are common carriers by water in foreign commerce the antitrust statutes, are, as to their conduct, "superseded" by the Shipping Act, 1916. Petitioner respectfully submits that "supersession" is only a euphemism for repeal and that

1. The Shipping Act, 1916, does not repeal, generally, *pro tanto,* or by statement of exception the antitrust statutes;

2. There has been no repeal by implication;

3. The Shipping Act, 1916 § 15, expressly provides the only way an agreement, otherwise within the antitrust statutes, can

be exempted from them, and that way is by Commission approval under the Shipping Act, which was not obtained; and

4. Under the "primary jurisdiction" doctrine there was no administrative question for Commission resolution before the court could proceed with Petitioner's action.

By consequence the judgment of dismissal should be reversed and the District Court directed to proceed with this action. But if we are wrong as to this, it still remains that the Commission could not adjudicate the Clayton Act § 4 treble damage issues and the judgment should be reversed, the cause to be held until the Commission determinations have become final, and the District Court should then proceed to appropriate disposition of this case.

It is respectfully submitted that the judgment of the Court of Appeals for the Ninth Circuit should be reversed with directions to reverse the judgment of the District Court with instructions to proceed agreeably to the determinations of this Court.

San Francisco, California, September 17, 1965.

ARTHUR B. DUNNE
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CERTIFICATE OF SERVICE

I, Arthur B. Dunne, certify as follows:

I am a member of the Bar of the Supreme Court of the United States. I represent Carnation Company, Petitioner in the above entitled matter, in whose behalf service of the foregoing brief has been effected as herein stated.

I certify that on or before September 17, 1965, I served the foregoing Brief on behalf of Petitioner upon the respondents and the Solicitor General of the United States by service of three (3) copies upon the Solicitor General of the United States and three (3) on each of the respective attorneys for respondents whose appearances have been entered herein by mailing the same at San Francisco, California, postage prepaid, first class mail, to the addressees in San Francisco, California, and airmail to the other addressees, as follows:

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Appendix

STATUTES

Appendix

STATUTES

[Copied from U.S.C.]

Sherman Act

§ Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* * * * (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; 15 USCA § 1.)

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890; c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282; 15 USCA § 2.)

§ 8. The word "person", or "persons", wherever used in sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. (July 2, 1890, c. 647, § 8, 26 Stat. 210; 15 USCA § 7.)

Clayton Act

§ 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-

fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731; 15 USCA § 15.)

Shipping Act, 1916

[Material in brackets was removed by the 1961 amendments and matter in italics was added by those amendments.]

§ 1. When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided,* That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the

United States, or any State, Territory, District or possession thereof, or of any foreign country. * * * (Sept. 7, 1916, c. 451, § 1, 39 Stat. 728; July 15, 1918, c. 152, § 1, 40 Stat. 900; as amended Sept. 19, 1961, Pub. L. 87-254, § 1, 75 Stat. 522; 46 USCA § 801.)

§ 14. No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or

unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense. *Provided,* That nothing in this section *or elsewhere in this chapter, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 814 of this title by the regulatory body administering this chapter, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 814 of this title. The term "dual rate contract arrangement" as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree.* (Sept. 7, 1916, c. 451, § 14, 39 Stat. 733; June 5, 1920, c. 250, § 20, 41 Stat. 996; as amended Aug. 12, 1958, Pub. L. 85—826, § 1, 72 Stat. 574; 46 USCA § 812.)

§ 14b. *Notwithstanding any other provisions of this chapter, on application the Federal Maritime Commission (hereinafter "Commission"), shall * * * by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract * * * which is available to all shippers and consignees on equal terms and conditions which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds * * *".* (Oct. 3, 1961 Pub. L. 87-346, § 1, 75 Stat. 762; 46 USC § 813a.)

§ 15. Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement [,] with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission [may] *shall* by order, *after notice and hearing,* disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, *or to be contrary to the public interest,* or to be in violation of this chapter, and shall approve all other agreements, modifications [,] or cancellations. *No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independnt action, or (2) in respect to any conference agreement, which fails to pro-*

vide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

[Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.]

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and [All] agreements, modifications, [or] *and* cancellations [made after the organization of the Board] shall be lawful only when and as long as approved by the Commission [, and] before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation [.]; *except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by sections 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.*

Every agreement, modification, or cancellation lawful under this section, *or permitted under section 813a of this title,* shall be

excepted from the provisions of sections 1-11 and 15 of Title 15,* and amendments and Acts supplementary thereto.

Whoever violates any provisions of this section *or of section 813a of this title* shall be liable to a penalty *of not more than* $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (Sept. 7, 1916, c. 451, § 15, 39 Stat. 733; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; as amended Oct. 3, 1961, Pub. L. 87-346, § 2, 75 Stat. 763; 46 USCA § 814.)

§ 16. It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employees thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever [.]; *Provided, that within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States*

*Antitrust Statutes, Sherman Act and Clayton Act. See App. p. 1 above.

may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the project, or setting aside the rate, rule, or regulation.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo as is granted to such carrier or other person subject to this chapter.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense. (Sept. 7, 1916, c. 451, § 16, 39 Stat. 734; June 16, 1936, c. 581, 49 Stat. 1518; as amended Oct. 3, 1961, Pub. L. 87–346, § 6, 75 Stat. 766; 46 USCA § 815.)

§ 17. No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the

carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. (Sept. 7, 1916, c. 451, § 17, 39 Stat. 734; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USCA § 816.)

§ 18. (*a*) Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges

filed in compliance with this section, except with the approval
the Commission and after ten days' public notice in the form
manner prescribed by the Commission, stating the increase p
posed to be made; but the Commission for good cause shown r
waive such notice.

Whenever the Commission finds that any rate, fare, char
classification, tariff, regulation, or practice, demanded, charg
collected, or observed by such carrier is unjust or unreasonable
may determine, prescribe, and order enforced a just and reasona
maximum rate, fare, or charge, or a just and reasonable classif
tion, tariff, regulation, or practice.

(b)(1) From and after ninety days following October 3, 1
every common carrier by water in foreign commerce and e
conference of such carriers shall file with the Commission and k
open to public inspection tariffs showing all the rates and cha
of such carrier or conference of carriers for transportation to
from United States ports and foreign ports between all points
its own route and on any through route which has been establis
Such tariffs shall plainly show the places between which fre
will be carried, and shall contain the classification of freigh
force, and shall also state separately such terminal or other cha
privilege, or facility under the control of the carrier or confere
of carriers which is granted or allowed, and any rules or reg
tions which in anywise change, effect, or determine any part or
aggregate of such aforesaid rates, or charges, and shall incl
specimens of any bill of lading, contract of affreightment, or o
document evidencing the transportation agreement. Copies of s
tariffs shall be made available to any person and a reasona
charge may be made therefor. The requirements of this sec
shall not be applicable to cargo loaded and carried in bulk with
mark or count.

(2) No change shall be made in rates, charges, classificati
rules or regulations, which results in an increase in cost to
shipper, nor shall any new or initial rate of any common carrie

water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, changes, classifications, rules or regulations as changed are to become effective: Provided, however, That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foregoing commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

(6) Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (Sept. 7, 1916, c. 451, § 18, 39 Stat. 735; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; As amended Oct. 3, 1961, Pub. L. 87-346, § 4, 75 Stat. 764; 46 USCA § 817.)

§ 19. Whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the Federal Maritime Board finds that such proposed increase rests upon changed conditions other than the elimination of said competition. (Sept. 7, 1916, c. 451, § 19, 39 Stat. 735; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USCA § 818.)

§ 21. The Federal Maritime Board and the Secretary of Commerce may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever

the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdeameanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment. (Sept. 7, 1916, c. 451, § 21, 39 Stat. 736; Ex. Ord. No. 6166, § 12 June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(5), 105(4), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1275, 1277; 46 USCA § 820.)

§ 22. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter. (Sept. 7, 1916,

c. 451, § 22, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, § 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 821.)

§ 23. Orders of the Federal Maritime Board relating to any violation of this chapter shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the Federal Maritime Board, other than for the payment of money, made under this chapter, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Board, or be suspended or set aside by a court of competent jurisdiction. (Sept. 7, 1916, c. 451, § 23, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, Title IX, § 904, 49 Stat. 2016; Aug. 4, 1939, c. 417, § 1, 53 Stat. 1182; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 822.)

§ 29. In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise. (Sept. 7, 1916, c. 451, § 29, 39 Stat. 737; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 828.)

§ 30. In case of violation of any order of the Federal Maritime Board for the payment of money the person to whom such award was made may file in the district court for the district in

which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order. (Sept. 7, 1916, c. 451, § 30, 39 Stat. 737; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 829.)

§ 32. Whoever violates any provision of this chapter, except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by fine of not to exceed $5,000 (Sept. 7, 1916, c. 451, § 32, 39 Stat. 738; 46 USC § 831.)

§ 33. This chapter shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, nor to confer upon the Federal Maritime Board concurrent power or jurisdiction over any matter within the power or jurisdiction of such Interstate Commerce Commission; nor shall this chapter be construed to apply to intrastate commerce. (Sept. 7, 1916, c. 451, § 33, 39 Stat. 738; Ex.Ord.No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 832.)

§ 43. The Commission shall make such rules and regulations as may be necessary to carry out the provisions of this chapter. (Sept. 7, 1916, c. 451, § 43, as added Oct. 3, 1961, Pub.L. 87—346, § 7, 75 Stat. 766; 46 USC § 841a.)

§ 45. This chapter may be cited as "Shipping Act, 1916" (Sept. 7, 1916, c. 451, § 45, formerly § 44, as added, July 15, 1918, c. 152, § 4, 40 Stat. 903, and renumbered Sept. 19, 1961, Pub.L. 87—254, § 2, 75 Stat. 522; 46 USC § 842.)

Intercoastal Shipping Act, 1933

§ 1. When used in this chapter—

The term "common carrier by water in intercoastal commerce" for the purposes of this chapter shall include every common and contract carrier by water engaged in the transportation for hire of passengers or property between one State of the United States and any other State of the United States by way of the Panama Canal. (Mar. 3, 1933, c. 199, § 1, 47 Stat. 1425; 46 USC § 843.)

§ 2. Every common carrier by water in intercoastal commerce shall file with the Federal Maritime Board and keep open to

public inspection schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and, if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water. The schedules filed, and kept open to public inspection as aforesaid by any such carrier shall plainly show the places between which passengers and/or freight will be carried, and shall contain the classification of freight and of passenger accommodations in force, and shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered to the passenger consignor, or consignee, and shall include the terms and conditions of any passenger ticket, bill of lading, contract of affreightment, or other document evidencing the transportation agreement. The terms and conditions as filed with the Federal Maritime Board shall be framed under glass and posted in a conspicuous place on board each vessel where they may be seen by passengers and others at all times. Such carriers in establishing and fixing rates, fares, or charges may make equal rates, fares, or charges for similar service between all ports of origin and all ports of destination, and it shall be unlawful for any such carrier, either directly or indirectly, through the medium of any agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any such carrier from extending service to any publicly owned terminal located on any improvement project authorized by the Congress at the same rates which it charges at its nearest regular port of call. Such schedules shall be plainly printed, and copies shall be kept posted in a public and conspicuous place at every wharf, dock, and office of such carrier where passengers or freight are received for transportation, in

such manner that they shall be readily accessible to the public and can be conveniently inspected. In the event that any such schedule includes the terms and conditions of any passenger ticket, bill of lading, contract of affreightment or other document evidencing the transportation agreement, as herein provided, copies of such terms and conditions shall be made available to any shipper, consignee, or passenger upon request. Such terms and conditions, if filed as permitted by this section and framed under glass and posted in a conspicuous place on board each vessel where they may be seen by passengers and others at all times, may be incorporated by reference in a short form of same actually issued for the transportation, or in a dock receipt or other document issued in connection therewith, by notice printed on the back of each document that all parties to the contract are bound by the terms and conditions as filed with the Federal Maritime Board and posted on board each vessel, and when so incorporated by reference every carrier and any other person having any interest or duty in respect of such transportation shall be deemed to have such notice thereof as if all such terms and conditions had been set forth in the short form document. (Mar. 3, 1933, c. 199, § 2, 47 Stat. 1425; Ex.Ord.No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg.Plan No. 21, §§ 104(2), 305, 306, 15 F.R. 3178, 64 Stat. 1274, 1277; Aug. 28, 1958, Pub.L. 85—810, 72 Stat. 977; 46 USC § 844.)

§ 3. Whenever there shall be filed with the Federal Maritime Board any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Board shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate,

fare, charge, classification, regulation, or practice: *Provided, however,* That there shall be no suspension of a tariff schedule or service which extends to additional ports, actual service at rates of said carrier for similar service already in effect at the nearest port of call to said additional port.

Pending such hearing and the decision thereon the Federal Maritime Board, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than four months beyond the time when it would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period. At any hearing under this paragraph the burden of proof to show that the rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the carrier or carriers. The Board shall give preference to the hearing and decision of such questions and decide the same as speedily as possible. (Mar. 3, 1933, c. 199, § 3, 47 Stat. 1426; Ex.Ord.No.6166, § 12, June 10, 1933; June 29, 1936, c. 858, Title IX, §§ 903(d), 904, 49 Stat. 2016; Aug. 4, 1939, c. 417, § 2, 53 Stat. 1182; 1950 Reorg.Plan No. 21, §§ 104(2), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 845.)

§ 4. Whenever the Federal Maritime Board finds that any rate, fare, charge, classification, tariff, regulation, or practice demanded charged, collected, or observed by any carrier subject to the pro-

visions of this chapter is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice. *Provided*, That the minimum-rate provision of this section shall not apply to common carriers on the Great Lakes. (Mar. 3, 1933, c. 199 § 4, as added June 23, 1938, c. 600, § 43(a), 52 Stat. 964, and amended 1950 Reorg.Plan No. 21, §§ 104(2), 305, 306, eff. May 24, 1950, 18 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 845a.)

§ 5. The provisions of this chapter are extended and shall apply to every common carrier by water in interstate commerce, as defined in section 801 of this title. (Mar. 3, 1933, c. 199, § 5, as added June 23, 1938, c. 600, § 43(a), 52 Stat. 964; 46 USC § 845b.)

§ 7. The provisions of the Shipping Act, 1916, as amended, shall in all respects, except as amended by this chapter, continue to be applicable to every carrier subject to the provisions of this chapter. (Mar. 3, 1933, c. 199, § 7, formerly § 5, 47 Stat. 1427, renumbered June 23, 1938, c. 600, § 43(c), 52 Stat. 965; 46 USC § 847.)

§ 8. This chapter may be cited as the Intercoastal Shipping Act, 1933. (Mar. 3, 1933, c. 199, § 8, formerly § 6, 47 Stat. 1427, renumbered June 23, 1938, c. 600, § 43(d), 52 Stat. 965; 46 USC § 848.)

Part III of the Interstate Commerce Act (Transportation Act of 1940)

§ 301. This chapter may be cited as part III of the Interstate Commerce Act. (Feb. 4, 1887, c. 104, Pt. III, § 301, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 929; 49 USC § 901.)

§ 302. For the purposes of this chapter—

(a) The term "person" includes any individual, firm, copartnership, corporation, company, association, joint stock association, and any trustee, receiver, assignee, or personal representative thereof.

(b) The term "Commission" means the Interstate Commerce Commission.

(c) The term "water carrier" means a common carrier by water or a contract carrier by water.

(d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter 1 of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

(e) The term "contract carrier by water" means * * *

(f) The term "vessel" means * * *

(g) The term "transportation facility" includes * * *

(h) The term "transportation" includes * * *

(i) The term "interstate or foreign transportation" or "transportation in interstate or foreign commerce", as used in this chapter, means transportation of persons or property—

> (1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States;
>
> (2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States.

(3) wholly by water, or partly by water and partly by railroad or motor vehicle, from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, and (B) in the case of a movement to a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States for movement to a place outside thereof, and, in the case of a movement from a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein after transshipment at a place within the United States in a movement from a place outside thereof.

(j) The term "United States" means the States of the United States and the District of Columbia.

(k) The term "State" means a State of the United States or the District of Columbia.

(l) The term "common carrier by railroad" means a common carrier by railroad subject to the provisions of chapter 1 of this title.

(m) The term "common carrier by motor vehicle" means a common carrier by motor vehicle subject to the provisions of chapter 8 of this title. (Feb. 4, 1887, c. 104, Pt. III, § 302, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 929; 49 USC § 902.)

[§ 303 (49 USC § 903) provides for certain exemptions and exceptions, affecting certain carriage (as carriage in bulk) and certain services. See *Barrett Line, Inc. v. United States*, 326 US 179.]

§ 304. (a) It shall be the duty of the Commission to administer the provisions of this chapter, and to that end the Commission shall have authority to make and amend such general or special rules and regulations and to issue such orders as may be necessary to carry out such provisions.

(b) The Commission shall have authority, for purposes of the administration of the provisions of this chapter, to inquire into and report on the management of the business of water carriers, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with water carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary.

(c) The Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the terms "common carrier by water", or "contract carrier by water", as the special nature of the services performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements consistent with the provisions of this chapter to be observed by the carriers so classified or grouped, as the Commission, after hearing, finds necessary or desirable in the public interest.

(d) Whenever it shall appear from complaint made to the Commission or otherwise that the rates, fares, regulations or practices of persons engaged in transportation by water to or from a port or ports of any foreign country in competition with

common carriers by water or contract carriers by water, caus
undue disadvantage to such carriers by reason of such competitio
the Commission may relieve such carriers from the provisions c
this chapter to such extent, and for such time, and in such mann
as in its judgment may be necessary to avoid or lessen such und
disadvantage, consistently with the public interest and the nation
transportation policy declared in this Act.

(e) Upon complaint in writing to the Commission by a
person, or upon its own initiative without complaint, the Commi
sion may investigate whether any water carrier has failed to con
ply with any provision of this chapter or with any requireme
established pursuant thereto, and if, after notice of and heari
upon any such investigation, the Commission finds that any su
carrier has failed to comply with any such provision or requi
ment, it shall issue an appropriate order to compel such carri
to comply therewith. Whenever the Commission is of opinion th
any complaint does not state reasonable grounds for action on i
part, it may dismiss such complaint. (Feb. 4, 1887, c. 104, Pt. I
§ 304, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 St
933; 49 USC § 904.)

§ 305. (a) It shall be the duty of every common carrier
water, with respect to transportation subject to this chapter whi
it undertakes or holds itself out to perform, or which it
required by or under authority of this chapter to perform,
provide and furnish such transportation upon reasonable requ
therefor, and to establish, observe, and enforce just and reasona
rates, fares, charges, and classifications, and just and reasona
regulations and practices, relating thereto and to the issuan
form, and substance of tickets, receipts, bills of lading, and ma
fests, the manner and method of presenting, marking, packi
and delivering property for transportation, the carrying of p
sonal, sample, and excess baggage, the facilities for transportati
and all other matters relating to or connected with such transp

tation in interstate or foreign commerce. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

(b) It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. Common carriers by water subject to this chapter may also establish reasonable through routes and joint rates, charges, and classifications with common carriers by water subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act, 1933, as amended (including persons who hold themselves out to transport goods but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and such through routes and joint rates, and all classifications, regulations, and practices established in connection therewith shall be subject to the provisions of this chapter. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such carriers.

(c) It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or

advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

(d) All common carriers by water shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this subsection the term "connecting line" means the connecting line of any common carrier by water or any common carrier subject to chapter 1 of this title. (Feb. 4, 1887, c. 104, Pt. III, § 305, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 934, and amended Aug. 24, 1962, Pub.L. 87—595, § 2, 76 Stat. 398; 49 USC § 905.)

§ 306. (a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign com-

merce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

(b) All charges of common carriers by water shall be stated in lawful money of the United States. The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published, filed, and posted; and the Commission is authorized to reject any tariff filed with it which is not in accordance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this chapter or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: *Provided,* That the provisions of section 1(7) and 22 of this title (which relate to transportation free and at reduced rates), together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water.

(d) No common carrier by water, unless otherwise provided by this chapter, shall engage in transportation subject to this chapter unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter. No change shall be made in any rate, fare, charge, classification, regulation, or practice specified in any effective tariff of a common carrier by water except after thirty days' notice of the proposed change filed and posted in accordance with this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow changes upon notice less than that herein specified, or modify the requirements of this section, either in particular instances or by general order applicable to special circumstances or conditions.

(e) It shall be the duty of every contract carrier by water to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith and to establish and observe reasonable regulations, and practices to be applied in connection with said reasonable minimum rates and charges. It shall be the duty of every contract carrier by water to file with the Commission, post, and keep open for public inspection, in accordance with such rules and regulations as the Commission shall prescribe, schedules of minimum rates or charges actually maintained and charged for interstate and foreign transportation to which it is a party, and any rule, regulation, or practice affecting such charges and the value of the service thereunder. No contract carrier by water, unless otherwise provided by this chapter, shall engage in transportation subject to this chapter unless the minimum rates or charges actually maintained and charged have been published, filed, and posted in accordance with the provisions of this chapter. No new rate or charge shall be established

and no reduction shall be made in any rate or charge, either directly or by means of any change in any rule, regulation, or practice affecting such rate or charge, or the value of service thereunder, except after thirty days' notice of the proposed new rate or charge, or of the proposed change, filed in accordance with this section. The Commission may, in its discretion and for good cause shown, allow the establishment of any such new rate or charge, or any such change, upon notice less than herein specified, or modify the requirement of this section with respect to posting and filing of such schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the new rate or charge, or the change proposed to be made, and the time when it will take effect. It shall be unlawful for any such carrier to transport passengers or property or to furnish facilities or services in connection therewith for a less compensation, either directly or by means of a change in the terms and conditions of any contract, charter, agreement, or undertaking, than the rates or charges so filed with the Commission: *Provided*, That the Commission, in its discretion and for good cause shown, either upon application of any such carrier or carriers, or any class or group thereof, or upon its own initiative may, after hearing, grant relief from the provisions of this subsection to such extent, and for such time, and in such manner as, in its judgment, is consistent with the public interest and the national transportation policy declared in this Act. (Feb. 4, 1887, c. 104, Pt. III, § 306, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 935; 49 USC § 906.)

§ 307. (a) Any person may make complaint in writing to the Commission that any individual or joint rate, fare, charge, classification, regulation, or practice of any common carrier by water or any contract carrier by water is or will be in violation of this chapter. Every complaint shall state fully the facts complained of and the reasons for such complaint and shall be made under oath.

(b) Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of opinion that any individual or joint rate, fare, or charge demanded, charged, or collected by any common carrier or carriers by water for transportation subject to this chapter, or any regulation, practice, or classification of such carrier or carriers relating to such transportation, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any provision of this chapter, it may determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful regulation, practice, or classification thereafter to be made effective.

(c) In any proceeding to determine the justness or reasonableness of any rate, fare, or charge of any common carrier by water there shall not be taken into consideration or allowed as evidence or elements of value of the property of such carrier either goodwill, earning power, or the certificate under which such carrier is operating; and in applying for and receiving a certificate under this chapter any such carrier shall be deemed to have agreed to the provisions of this subsection on its own behalf and on behalf of all transferees of such certificate.

(d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the

Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15 of this title.

(e) Whenever, after hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and common carriers by railroad or by motor vehicle, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers. In cases where the joint rate, fare, or charge, was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and

determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

(f) In the exercise of its power to prescribe just and reasonable rates, fares, and charges of common carriers by water, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service.

(g) Whenever there shall be filed with the Commission any schedule (except a schedule referred to in section 922 of this title) stating a new rate, fare, charge, classification, regulation, or practice for the interstate or foreign transportation of passengers or property by a common carrier or carriers by water, the Commission may upon protest of interested parties or upon its own initiative at once, and, if it so orders, without answer or other formal pleading by such carrier or carriers, but upon reasonable notice, enter upon an investigation concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice, and pend-

ing such hearing and the decision thereon, the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto, as would be proper in a proceeding instituted after such rate, fare, charge, classification, regulation, or practice had become effective. If the proceeding shall not have been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period: *Provided, however,* That this subsection shall not apply to any initial schedule filed prior to October 1, 1941, by any such carrier (other than a carrier subject, at the time this chapter takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended, or the Shipping Act, 1916, as amended) insofar as such schedule names rates on traffic, or for services connected therewith, as to which such carrier was in bona fide operation on January 1, 1940. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

(h) Whenever, after hearing, upon complaint or its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by water, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, contravenes the national transportation policy declared in this Act, or is in contravention of any provision

of this chapter, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this chapter. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by water subject to this chapter, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in this Act, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath.

(i) Whenever there shall be filed with the Commission by any such contract carrier any schedule (except a schedule referred to in section 922 of this title) stating a charge for a new service or a reduced charge, directly or by means of any rule, regulation, or practice, for transportation in interstate or foreign commerce, the Commission may upon complaint of interested parties or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether

completed before or after the charge, or rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change in any charge or rule, regulation, or practice shall go into effect at the end of such period: *Provided,* That this subsection shall not apply to any initial schedule filed prior to October 1, 1941, by any such carrier (other than a carrier subject, at the time this chapter takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended, or the Shipping Act, 1916, as amended) insofar as such schedule names charges on traffic, or for services connected therewith, as to which such carrier was in bona fide operation on January 1, 1940. The rule as to burden of proof specified in subsection (g) of this section shall apply to this subsection. (Feb. 4, 1887, c. 104, Pt. III, § 307 as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 937; 49 USC § 907.)

§ 308. (a) For the purposes of this section the term "carrier" means a common carrier by water.

(b) In case any carrier shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

(c) Any person or persons claiming to be damaged by any carrier may either make complaint to the Commission or may bring suit in his or their own behalf for the recovery of the damages for which such carrier may be liable under the provisions of

subsection (b) of this section, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies.

(d) If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof by any carrier, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(e) If such carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file with the district court of the United States for the district in which he or it resides or in which is located the principal operating office of such carrier or in which is located any port of call on a route operated by such carrier, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

(f) (1) (A) All actions at law by carriers subject to this chapter for the recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

(B) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (D) of this subsection.

(C) For the recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within three years from the time the cause of action accrues, and not after, subject to subdivision (D) of this subsection, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(D) If on or before expiration of the two-year period of limitation in subdivision (B) of this subsection or the three-year period of limitation in subdivision (C) of this subsection a carrier subject to this chapter begins action under subdivision (A) of this subsection for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(2) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier and not after.

(3) A complaint for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

(4) The term "overcharges" as used in this section means charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

(5) The provisions of this subsection shall extend to and e
brace all transportation of property or passengers for or on beh
of the United States in connection with any action brought bef
the Commission or any court by or against carriers subject to t
chapter: *Provided, however*, That with respect to such transpor
tion of property or passengers for or on behalf of the Uni
States, the periods of limitation herein provided shall be exte
ed to include three years from the date of (A) payment
charges for the transportation involved, or (B) subsequent refu
for overpayment of such charges, or (C) deduction made un
section 66 of this title, whichever is later.

(g) In such suits all parties in whose favor the Commissi
may have made an award of damages by a single order may
joined as plaintiffs, and all of the carriers parties to such or
awarding such damages may be joined as defendants, and su
suit may be maintained by such joint plaintiffs and against su
joint defendants in any district where any one of such joint pla
tiffs could maintain such suit against any one of such joint
fendants; and service of process against any one of such defe
ants as may not be found in the district where the suit is brou
may be made in any district where such defendant has his or
principal operating office. In case of such joint suit the recovery
any, may be by judgment in favor of any one of such plainti
against the defendant found to be liable to such plaintiff. (F
4, 1887, c. 104, Pt. III, § 308, as added Sept. 18, 1940, c. 7
Title II, § 201, 54 Stat. 940, and amended June 29, 1949, c. 2
§§ 2, 3(a), 4, 63 Stat. 281; Aug. 26, 1958, Pub.L. 85–762, § 1(
(6), 72 Stat. 860; 49 USC § 908.)

§ 309. (a) Except as otherwise provided in this section a
section 911 of this title, no common carrier by water shall eng
in transportation subject to this chapter unless it holds a certific
of public convenience and necessity issued by the Commission:

[Here follows a "grandfather clause" (see *Barrett Line, Inc. v. United States,* 326 U.S. 179, 180) and provisions regulating the issuance of certificates to common carriers and permits to contract carriers.]

(Feb. 4, 1887, c. 104, Pt. III, § 309, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 941 and July 12, 1960, Pub.L. 86–615, §§ 4, 5, 74 Stat. 384; 49 USC § 909.)

§ 313. (a) The Commission is authorized to require annual, periodical, or special reports from water carriers, lessors, and associations (as defined in this section), and to prescribe the manner and form in which such reports shall be made, and to require from such carriers, lessors, and associations specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, lessor, or association in such form and detail as may be prescribed by the Commission. Said annual reports shall contain all the required information for the period of twelve months ending on the thirty-first day of December in each year, unless the Commission shall specify a different date, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission. Such periodical or special reports as may be required by the Commission under this subsection shall also be under oath whenever the Commission so requires.

(b) The Commission may also require any such carrier to file with it a true copy of any contract, charter, or agreement between such carrier and any other carrier or person in relation to transportation facilities, service, or traffic affected by the provisions of this chapter. The Commission shall not, however, make public any contract, charter, or agreement between a contract carrier by water and a shipper, or any of the terms or conditions thereof, except

as a part of the record in a formal proceeding where it considers such action consistent with the public interest: *Provided,* That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by water as required by section 906 (e) of this title, the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof.

(c) The Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this chapter, prescribe a uniform system of accounts applicable to any class of water carriers, and a period of time within which such class shall have such uniform system of accounts, and the manner in which such accounts shall be kept.

(d) The Commission shall, as soon as practicable, prescribe for water carriers the classes of property for which depreciation charges may properly be included under operating expenses, and the rate or rates of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and rates so prescribed. When the Commission shall have exercised its authority under the foregoing provisions of this subsection, water carriers shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a rate of depreciation other than that prescribed therefor by the Commission, and no such carrier shall in any case include under operating expenses any depreciation charge in any form whatsoever other than as prescribed by the Commission.

(e) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by water carriers and lessors, including the accounts, records, and

memoranda of the movement of traffic, as well as of the receipts and expenditures of money, and it shall be unlawful for such carriers or lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto.

(f) The Commission or its duly authorized special agents, accountants, or examiners shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents, of such water carriers and lessors, and of associations (as defined in this section), and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier as the Commission deems relevant to such person's relation to or transactions with such carrier. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to all lands, buildings, or equipment of such carriers or lessors, and shall have authority under its order to inspect and examine any and all such lands, buildings, and equipment. All such carriers, lessors, and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and for copying authorized by this subsection, and such carriers and lessors shall submit their lands, buildings, and equipment for inspection and examination, to any duly authorized special agent, accountant, or examiner of the Commission, upon demand and the display of proper credentials.

(g) The Commission may issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, correspondence, or documents of water carriers or lessors as may, after a reasonable time, be destroyed, and prescribing the length of time the same shall be preserved.

(h) As used in this section, the words "keep" and "kept" shall be construed to mean made, prepared, or compiled, as well as retained; the term "lessor" means a lessor of any right to operate

as a water carrier; the term "water carrier" or "lessor" includes a receiver or trustee of such water carrier or lessor; and the term "association" means an association or organization maintained solely by water carriers subject to this chapter which engages in activities relating to the fixing of rates, publication of classifications, or filing of schedules by such carriers. (Feb. 4, 1887 c. 104, Pt. III, § 313, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 944, and amended Aug. 2, 1949, c. 379, §§ 16-18, 63 Stat. 488; 49 USC § 913.)

§ 314. If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. (Feb. 4, 1887, c. 104, Pt. III, § 314, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 945; 49 USC § 914.)

§ 315. (a) It shall be the duty of every water carrier to file with the Commission a designation in writing of the name and post-office address of an agent upon whom or which service of notices or orders may be made under this chapter. Such designation may from time to time be changed by like writing similarly filed. Service of notices or orders in proceedings under this chapter may be made upon such carrier by personal service upon it or upon an agent so designated by it, or by mail addressed to it or to such agent at the address filed. In default of such designation, service of any notice or order may be made by posting in the office of the secretary of the Commission. Whenever notice or order is served by mail, as provided herein, the date of mailing shall be considered

as the time of service. In proceedings before the Commission involving the lawfulness of rates, fares, charges, classifications, or practices, service of notice of the suspension of a tariff or schedule upon an attorney in fact of a carrier who has filed a said tariff or schedule in behalf of such carrier naming the rates, fares, charges, classification, or practices involved in such proceedings shall be deemed to be due and sufficient service upon the carrier and service of notice of the suspension of a joint tariff or schedule upon a carrier which has filed said joint tariff to which another carrier is a party naming the rates, fares, charges, classifications, or practices involved in such proceedings shall be deemed to be due and sufficient service upon the several carriers parties thereto, but such manner of service shall not be considered as excluding service in any other manner authorized by law.

(b) No order, based upon a finding that any water carrier has violated any provision of this chapter, shall be made by the Commission except after hearing upon complaint or after an investigation upon its own initiative.

(c) The Commission may suspend, modify, or set aside its orders under this chapter upon such notice and in such manner as it shall deem proper.

(d) Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended, modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

(e) It shall be the duty of every water carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect. (Feb. 4, 1887, c. 104, Pt. III, § 315, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat.

946, and amended Aug. 2, 1949, c. 379, § 19, 63 Stat. 489; 49 USC § 915.)

§ 316. (a) The provisions of sections 12, 17, and 46-48 of this title shall apply with full force and effect in the administration and enforcement of this chapter.

(b) If any water carrier fails to comply with or operates in violation of any provision of this chapter (except provisions as to the reasonableness of rates, fares, or charges, and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder (except an order for the payment of money), or of any term or condition of any certificate or permit, the Commission or the Attorney General of the United States (or, in case of such an order, any party injured by the failure to comply therewith or by the violation thereof) may apply to any district court of the United States having jurisdiction of the parties for the enforcement of such provision of this chapter or of such rule, regulation, requirement, order, term, or condtion; and such court shall have jurisdiction to enforce obedience thereto by a writ or writs of injunction or other process, mandatory or otherwise, restraining such carrier and any officer, agent, employee, or representative thereof from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining obedience thereto.

(c) The Commission shall enter of record a written report of hearings conducted upon complaint, or upon its own initiative without complaint, stating its conclusions, decisions, and order and, if reparation is awarded, the findings of fact upon which the award is made; and shall furnish a copy of such report to all parties of record. The Commission may provide for the publication of such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be received as competent evidence of such reports in any court of competent jurisdiction.

(d) Subject to the provisions of section 913 of this title, the copies of schedules, and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements of water carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required, under the provisions of this chapter shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals. (Feb. 4, 1887, c. 104, Pt. III, § 316, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 946; 49 USC § 916.)

§ 317. (a) Any person who knowingly and willfully violates any provisions of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate or permit, for which no penalty is otherwise provided, shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was in whole or in part committed shall be subject for each offense to a fine not exceeding $500. Each day of such violation shall constitute a separate offense.

(b) Any water carrier or any officer, agent, employee, or representative thereof, who shall knowingly and willfully offer, grant, or give, or cause to be offered, granted, or given, any rebate, deferred rebate, or other concession, in violation of the provisions of this chapter, or who, by any device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person to obtain transportation subject to this chapter at less than the rates, fares, or charges lawfully in effect, shall be deemed guilty

of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed shall be subject for each offense to a fine of not more than $5,000.

(c) Any person who shall knowingly and willfully solicit, accept, or receive any rebate, deferred rebate, or other concession in violation of the provisions of this chapter, or who shall by any device or means, whether with or without the consent or connivance of any water carrier or his or its officer, agent, employee, or representative, knowingly and willfully obtain transportation subject to this chapter at less than the rates, fares, or charges lawfully in effect, or shall knowingly and willfully, directly or indirectly, by false claim, false billing, false representation, or other device or means, obtain or attempt to obtain any allowance, refund, or repayment in connection with or growing out of such transportation, whether with or without the consent or connivance of such carrier or his or its officer, agent, employee, or representative, whereby the compensation of such carrier for such transportation or service, either before or after payment, shall be less than the rates, fares, or charges lawfully in effect, shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was in whole or in part committed, be subject for each offense to a fine of not more than $5,000.

(d) Any water carrier or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this chapter, or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall willfully falsify, destroy, mutilate, or alter any report, account, record, memorandum, book, correspondence, or

other document, required under this chapter to be kept, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions as required under this chapter, or shall willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, or shall knowingly and willfully file with the Commission any false report, account, record, or memorandum, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was in whole or in part committed, be subject for each offense to a fine of not more than $5,000. As used in this subsection, the word "keep" shall be construed to mean made, prepared, or compiled, as well as retained.

(e) Any special agent, accountant, or examiner of the Commission who knowingly and willfully divulges any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of section 913 of this title, except as he may be directed by the Commission or by a court or judge thereof, shall be guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than $500 or imprisonment for a term not exceeding six months, or both.

(f) It shall be unlawful for any common carrier by water, or any officer, receiver, trustee, lessee, agent, or employee of such carrier, or for any other person authorized by such carrier or person to receive information, knowingly and willfully to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such carrier for transportation subject to this chapter, which information may be used to the detriment or prejudice of such shipper or

consignee, or which may or does improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person to solicit or knowingly and willfully receive any such information which may be or is so used. Any person violating any provisions of this subsection shall be guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was in whole or in part committed shall be subject to a fine of not more than $2,000. Nothing in this chapter shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States or of any State, Territory, or District thereof, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes, or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers. (Feb. 4, 1887, c. 104, Pt. III, § 317, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 947; 49 USC § 917.)

§ 318. No common carrier by water shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for periodical settlement, and to prevent unjust discrimination or undue preference or prejudice: *Provided,* That the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia. Where such carrier is instructed by a

shipper or consignor to deliver property transported by such carrier to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (1) is an agent only and had no beneficial title in the property, and (2) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made or handled. An action for the enforcement of such liability may be begun within two years from the time the cause of action accrues, or before the expiration of six months after final judgment against the carrier in an action against the consignee begun within said period. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. An action for the enforcement of such liability may be begun within two years from the time the cause of action accrues, or before the expiration of six months after final judgment against the carrier in an action against the beneficial owner named by the consignee begun within said period. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or

abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. (Feb. 4, 1887, c. 104, Pt. III, § 318, as added Sept. 18, 940, c. 722, Title II, § 201, 54 Stat. 949; 49 USC § 918.)

§ 320. (a) The Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended are repealed insofar as they are inconsistent with any provision of this chapter and insofar as they provide for the regulation of, or the making of agreements relating to, transportation of persons or property by water in commerce which is within the jurisdiction of the Commission under the provisions of this chapter; and any other provisions of law are repealed insofar as they are inconsistent with any provision of this chapter.

(b) Nothing in subsection (a) of this section shall be construed to repeal—

(1) section 1115 of Title 46, or any provision of law providing penalties for violations of said section;

(2) the third sentence of section 844 of Title 46, as extended by section 845b of Title 46, or any provision of law providing penalties for violations of section 844 of Title 46;

(3) the provisions of the Shipping Act, 1916, as amended, insofar as such Act provides for the regulation of persons included within the term "other person subject to this chapter", as defined in such Act;

(4) sections 883 and 884 of Title 46.

(c) Nothing in subsection (a) of this section shall be construed to affect the provisions of section 814 of Title 46 so as to prevent any water carrier subject to the provisions of this chapter from entering into any agreement under the provisions of said section with respect to transportation not subject to the provisions of this chapter in which such carrier may be engaged.

(d) Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or

damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter.

(e) Subsection (e) of section 153 of this title, is repealed as of October 1, 1940: *Provided, however,* That (1) any certificate of public convenience and necessity granted to any carrier pursuant to the provisions of said subsection shall continue in effect as though issued under the provisions of section 909 of this title; and (2) through routes and joint rates, and rules, regulations, and practices relating thereto, put into effect pursuant to the provisions of said subsection shall, after the repeal of said subsection, be held and considered to have been put into effect pursuant to the provisions of the Interstate Commerce Act, as amended. (Feb. 4, 1887, c. 104, Pt. III, § 320, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 950; 49 USC § 920.)

Federal Maritime Commission

No. 872

Served
July 28, 1965
Federal Maritime Commission

JOINT AGREEMENT BETWEEN MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

[Footnotes indicated by numbers are those of the Report. Foot-notes indicated by letters are ours.]

[Headnotes and appearances omitted.]

REPORT

By the Commission: (John Harllee, Chairman; Ashton C. Bar-rett and James V. Day, Commissioners)

This matter is before us on exceptions to the Initial Decisio[n] of Chief Examiner Gus O. Basham.

The Federal Maritime Board, our predecessor, instituted thi[s] investigation on its own motion on October 26, 1959, in orde[r] to determine whether Agreement No. 8200 between the mem-ber lines of the Far East Conference and the member lines of th[e] Pacific Westbound Conference is a true and complete agreemen[t] between the parties; whether Agreement No. 8200 is being carrie[d] out in a manner which makes the agreement unjustly discrimina-tory or unfair as between carriers, shippers, exporters or port[s] or between exporters from the United States and their foreig[n] competitors; and whether the Agreement operates to the detri-

1. Commissioner George H. Hearn did not participate.

ment to the commerce of the United States or violates the Shipping Act, 1916.

Agreement No. 8200 was signed on November 5, 1952, and was approved by the Federal Maritime Board pursuant to section 15 of the Shipping Act, 1916, on December 29, 1952. By the terms of the agreement, the parties thereto agree to establish from time to time "rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates,"[a] excepting rates on twelve specified commodities. The agreement further stipulates the procedures for subsequent meetings or inter-conference interchanges of information to accomplish the objectives of the agreement.

[Here is a brief statement of some of the steps leading up to the making and approval of Agreement No. 8200 Articles First and Second of the Agreement (R 47-49) are then set out in full, and the remaining Articles are very briefly summarized.]

The members of the respondent Conferences have met and adopted resolutions or have collectively agreed to a common course of action at meetings held at least annually since 1953, as evidenced by written minutes which were furnished to the Board and the Commission.

At a meeting in May 1956, the following action was taken: "At the close of each Joint Meeting the Spokesmen for the two Conferences shall agree upon that portion of the Minutes of that Meeting which shall become a part of the Memorandum of Decisions." These Memoranda are exhibits in the record of this proceeding.

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a. The quoted language is not part of any of the contractual undertakings but is only a part of paragraph 4 of the recitations and is only a recitation that "for the accomplishment of the purposes of this agreement it is essential that the parties shall, from time to time, establish the rates to be charged etc." (R 47) The principal contractual provisions are in "First" and "Second". (R 47-49)

I. *The supplementary agreements.*

We now come to the first issue set out in the Order of Investigation, which is: Is Agreement No. 8200 a true and complete agreement between the parties? The Examiner held that the agreement was not a true and complete agreement between the parties, and that the conferences should file various "supplementary agreements"[1] with the Commission for approval before reapproval of Agreement No. 8200 is given by the Commission. The respondent conferences have excepted to this finding, arguing that these supplemental agreements are within the contemplation of the joint agreement, because the first paragraph of the joint agreement provides:

> The initial meeting shall make rules . . . for the transaction of such . . . business as the parties may be permitted to conduct by virtue hereof including the provision of the machinery for the change of rates. . . .

The conferences further argue that, even if the supplementary agreements are not encompassed within the scope of the joint agreement, they have received the blessing of the Commission's predecessor, and the Commission is prevented by reason of the principle of "administrative estoppel" from finding a violation of the Shipping Act, 1916. We disagree with respondents as to both of their arguments, for the reasons hereinafter stated.

The threshold question as we see it is whether or not the supplementary agreements are within the purview of section 15, which reads in pertinent part, as follows:

[Here the first paragraph of § 15 is set out.]

As early as 1927, the United States Shipping Board, one of our predecessor agencies, limited the language of section 15:

> As contended by conference representatives in this proceeding, a too literal interpretation of the word "every" to in-

1. These supplementary agreements which deal with placement of items on the initiative list, overland rates, and concurrence procedures are described more fully, *infra.*

> clude routine actions between the carriers under conference agreements would result in delays and inconvenience to both carriers and shippers. *Ex Parte 4, Section 15 Inquiry,* 1 U.S. S.B. 121, at 125 (1927).

Subsequent cases have elaborated on the aspect of "routine actions" so as to confine the same to day-to-day interstitial workings under the agreement. Thus, in *Mitsui Steamship Company v. Anglo-Canadian Shipping Co.,* 5 F.M.B. 72 (1956), the Federal Maritime Board held that a "new conference interpretation is an agreement or a modification of an approved agreement between carriers which requires specific approval under section 15 of the Act, ..." 5 F.M.B. at 91-92. And, in 1957, the Board held that an agreement between Matson Navigation Co. and Encinal Terminals was not a true and complete agreement:

> In approving Agreement No. 8063, the Board sanctioned an agreement under which Matson and Encinal were to form a corporation known as Matcinal, which agreement is little more than evidence of a general intention of the parties to enter the stevedoring, terminal, and carloading and unloading business as partners acting through the new corporate entity. *Associated-Banning Co. et al. v. Matson Navigation Co. et al.,* 5 F.M.B. 336, at 341 (1957).

More recently, we have elaborated on the definition of "routine" in *Pacific Coast Port Equalization Rule,* 7 F.M.C. 623 (1963). In that case we determined that a rule providing for port equalization did "not constitute conventional or routine rate-making among carriers. It is a new arrangement for the regulation and control of competition. Moreover, it affects third party interests such as ports and facilities from which traffic is drawn and it obviously is not 'a pure regulation of intra-conference competition.' " 7 F.M.C. 623, at 630. In affirming the Commission, the U.S. Court of Appeals for the Ninth Circuit stated:

> We are unable to agree with petitioners that Rule 29 is within the scope of their approved Conference Agreement.

> Such agreement contains no provision expressly authorizing port equalization, nor do we find any implicit authority contained therein. *American Export & Isbrandtsen Lines, et al. v. Federal Maritime Commission, et al.*, 334 F.2d 185, 198 (1964).

We think that the holdings in the Commission decisions cited above clearly militate in favor of the position that the "supplementary agreements" were not within the purview of Agreement No. 8200 and were not routine, day-to-day arrangements which are exempt from the filing requirements of section 15. The *Associated Banning* case is particularly in point. It appears to us that Agreement No. 8200 is nothing more than evidence of a general intention of the parties to enter into concerted ratemaking. It sets out no details, no procedures, with the exception of the procedures to be taken at the initial meeting, nor does it inform any interested person as to how the agreement is to work.

Although not articulated in past cases, we are of the opinion that the applicable test here is whether or not the Agreement as filed with the Commission and as approved sets out in adequate detail the procedures and arrangements under which the concerted activity permitted by the agreement is to take place. Any interested party should be able, by a reading of the agreement, to ascertain how the agreement is to work, without resort to inquiries of the parties or an investigation by the Commission. This is not to say that we are limiting the scope of "routine actions" which need not be the subject of section 15 filings; we are merely giving purpose to the requirements of the section. We can see no reason for the filing of agreements if they do not inform the Commission and the public in more than the barest outline as to how the agreement is to be carried out. No one reading Agreement No. 8200 could reasonably have been informed as to the procedures under which the respondent conferences were carrying out the agreement nor as to the nature of

the supplementary agreements which respondents claim are within the contemplation of Agreement No. 8200. Thus, we hold that the supplementary agreements relating to rate-making initiative, overland rates, rate differentials and the concurrence procedures (encompassing all instances of the operation of the concurrence machinery except for the placement of items on the agenda of the initial meeting)[2] are without sanction in the basic Agreement No. 8200, were therefore required by section 15 of the Shipping Act, 1916, to be filed with the Commission for approval, and, not having been so filed, were and are being carried out in violation of the said section 15.

[Here the Report discusses the claim of "administrative estoppel". We omit this, except the next following paragraph because in this proceeding no one has suggested that any agreements outside No. 8200 have been filed or approved.]

The only agreement filed by respondents in accordance with the Commission's rules regulating the manner of filing agreements was Agreement No. 8200. The actions at the various meetings produced oral agreements which were reduced to memoranda thereof in the form of minutes. The minutes were further abstracted and put into a "Memorandum of Decisions." These were clearly not filed pursuant to the Commission's rules accompanied by a letter of transmittal "stating that they are offered for file in compliance with section 15 of the Shipping Act, 1916, ..." 46 CFR § 522.1.

* * *

II. *The concurrence procedures.*

The Examiner found in his Initial Decision that the supplementary agreement requiring both respondent conferences to concur in matters voted on is sanctioned by the joint agreement, but is in violation of Public Law 87-346. We think that a brief dis-

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2. See our discussion of the concurrence procedures, *infra*.

cussion of the concurrence procedures as we understand them is in order.

First, all matters coming before the initial meeting held pursuant to the agreement were subject to concurrence before being placed on the agenda of the initial meeting. Agreement No. 8200 specifically provides that "All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the PACIFIC LINES acting as a group, and of the ATLANTIC/GULF LINES, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates." The above-quoted provision is the only specific reference in Agreement 8200 to the concurrence procedure. However, the initial meeting and procedure adopted subsequent thereto extended the concurrence procedure in the following additional circumstances:

(1) The assignment of items to the initiative list is subject to concurrence, although there is a prior requirement that seventy percent of the total annual movement of cargo of a particular item must be handled by the conference obtaining that item on its list. The Examiner found (Initial Decision, pp. 4-5) that "At the initial meeting . . . respondents established the basic principles . . . (4) the manner of voting on the assignment to a conference of rate-making power or "initiative" on certain items, and the manner of voting of individual rate applications on other items . . . ."

(2) Rate changes on competitive items are subject to concurrence, as found by the Examiner (Initial Decision, p. 5) that the parties set up machinery governing "the manner of voting on individual rate applications on other items, i.e. a requirement that both conferences must concur in all such actions." This is admitted by one of the respondents, Pacific Westbound Conference, in its Exceptions to the Initial Decision:

> Moreover, the ultimate treatment of shippers whose commodities are on the initiative list and of those whose commodities are not on the list is exactly the same . . . . The procedure is no different for initiative commodities. Exceptions, p. 21.

(3) Rate changes on initiative items are subject to concurrence where the conference requesting a particular change does not have the initiative (i.e., such as the request for change in rate on evaporated milk when PWC did not have the initiative). This fact is borne out by the record developed in this case, and, more particularly, by the facts pertaining to the charge of discrimination made by Carnation Company (which will be discussed, *infra.*). These added instances of the operation of the concurrence procedure appear to us to go far beyond an agreement to concur in matters voted on. Were we confined to the latter, we could agree with the Examiner that the basic agreement sanctions the concurrence procedure. However, the concurrence procedures touch other matters than the content of the agenda of the initial meeting. Respondents will therefore be required to cease and desist from carrying out the concurrence procedures until the same be filed with and approved by the Commission.

The respondent conferences have excepted to the Examiner's finding that the concurrence procedure does not meet the tests of the "independent action" provisions of P.L. 87-346. The conferences point out that Article Second of Agreement No. 8200 "clearly reserves the right of each conference to act independently of the procedures adopted in and pursuant to the agreement." The Examiner decided "as a matter of law that the concurrence provision is illegal, regardless of any testimony in support thereof." He relied on the provision of section 15 which directs the Commission not to approve any agreement between conferences and carriers serving different trades that would otherwise be competitive unless each conference retains the right of inde-

pendent action. The Examiner has held that the statutory requirement is not met if, under certain circumstances, the parties do not exercise the right of independent action. The Examiner has therefore translated the mere existence of the right to a requirement that it be exercised. We think that the Examiner has applied the statute too strictly, and we therefore sustain the conferences' exception.

Section 15 provides a standard for approval of agreements based on the contents of the agreements. In the instant case, the agreement creates a "right" of independent action after certain preliminary notices to the other party. The Examiner, however, considered that the facts of the operation of the agreement are controlling, rather than the bare provisions of the agreement, relying on selected excerpts from House Report 498, 87th Cong., 1st Sess., pp. 9-10 which in turn refer to how a joint agreement "has operated." We believe that Congress was only restricting the authority to approve agreements when it enacted P.L. 87-346, and was not establishing standards by which to judge the operations of agreements. Upon an initial examination of an agreement between conferences, we are confined to a determination as to whether or not the agreement provides for the right of independent action. That is all the statute requires. And, Agreement No. 8200 meets the statutory requirement in specific terms. This is not to say, however, that in the future we would be confined to "the four corners" of an agreement in a subsequent proceeding to determine whether an agreement should be reapproved, modified, or disapproved. It could well be that actual operations under an agreement, subsequent to our initial approval, might show that the agreement was being carried out in a manner as to make it detrimental to the commerce of the United States or contrary to the public interest. Then, disapproval would be in order.

In conclusion, the statute provides adequate means for disapproval should the same be required. We do not, however,

find that such disapproval is warranted by the evidence of record in this case. We are unable to find any evidence of a secret agreement between Pacific Westbound and Far East that Pacific Westbound would give up its right of independent action. Such an agreement, we hold, has never existed. The right was created in Agreement 8200 in conformance with the statutory requirement, and it was never given up.

III. *The initiative list.*

The Examiner found that the manner of determining whether or not commodities are placed on the rate-making initiative is violative of section 16 of the Shipping Act, 1916, in that the procedure subjects shippers to undue prejudice and disadvantage. The conferences have excepted to this finding, and the Far East Conference has taken further exception to the Examiner's finding that it unjustly discriminated against Carnation Company by refusing to concur in Pacific Westbound's requests for the initiative on evaporated milk until May of 1961.

The initiative procedure provides a method whereby certain commodities are classified in two categories in such a way as to locate the power to change rates with or without agreement or concurrence. The conferences first agreed that the so-called "local initiative" rate-making authority would be established with respect to an agreed list of commodities if seventy percent of the total annual movement originated in either conference's local territory. Later, in 1956, the method of agreeing on the commodities to be listed was changed to require concurrence by the other conference before establishing "rate-making initiative on commodities, pursuant to the formula." An agreed list was then prepared.

The commodity evaporated milk in 1953 was not classified and placed on the list of Pacific Westbound and remained off the list until 1961, after this proceeding was instituted, even though in 1960-1961 ninety percent or more of the evaported milk was

moving from the West Coast to the Philippines. The record shows that before 1961 Far East had refused to concur in such placement in spite of the formula commitment the conferences made to each other regarding the seventy percent test.

A right to concur was established in May 1956, when it was agreed "authority to establish rate-making initiative on commodities pursuant to the formula defined in the preceding paragraph [the seventy percent formula] may only be granted[b] . . . after concurrence by the other Conference."

Carnation, a shipper of evaporated milk, was affected before and after the right to concur was established. Before May 1956, evaporated milk remained off the initiative list of Pacific Westbound for no apparent reason, and after May 1956 because Far East would not concur. Apparently, no request should have been needed in either period to classify evaporated milk as an "initiative" commodity. Carnation's first record request for a rate change by Pacific Westbound was on November 11, 1957, after the addition of the concurrence procedure. Carnation was unsuccessful because Far East would not concur, although at this time Carnation did not know why because the initiative list and concurrence procedure were still secret[3] as far as Carnation was concerned. Carnation persisted in its efforts and Pacific Westbound persisted in trying to obtain concurrence (December 1957 through May 1958—13 exchanges between Far East and Pacific Westbound), but without success for three years, even though Far East was handling ten percent or less of the volume of evaporated milk shipped to the Philippines.

Both before and after the concurrence procedure was added, Carnation and the public had every reason to believe that Pacific

b. The omitted words are "to the Conference desiring such initiative".

3. The minutes of the first meeting state that the "proceedings of minutes are confidential" and that "unauthorized disclosure to shippers of information regarding rate changes" and positions "regarding rate requests is contrary to the spirit of the Joint Agreement."

Westbound was making its own decisions on rates based on the economics of shipment from the West Coast. It was developed in the record that this was far from the case and not only was the concurrence procedure interfering with Pacific Westbound's initiative decisions, but that Far East had conflicting interests in that it had to protect the movement of powdered milk from the East Coast. A shipper of powdered milk had demanded the same reduction as evaporated milk, so a change in the evaporated milk rate would affect the revenues of Far East members.

This conduct on the part of Far East and acquiescence therein by Pacific Westbound in the exercise of their respective powers shows that the seventy percent rule for giving the rate-making initiative, whether or not affected by the concurrence restriction, became a sham. The agreed-upon condition called for the exercise of independent action by Pacific Westbound, but it failed to act independently as it had a right to do under Article "SECOND" of Agreement No. 8200. Both Far East and Pacific Westbound, we hold, subjected Carnation, as a shipper; West Coast ports, as localities; and the commodity evaporated milk to unreasonable disadvantage in violation of section 16 of the Shipping Act, 1916. In our opinion the respondents' failure to abide by commitments when it suited the interests of the parties, without satisfactory reason, made the disadvantage "unreasonable."

In our view, Pacific Westbound violated section 16 of the Shipping Act, 1916, by not taking independent action when it clearly had the right so to do. This is not to say that the right had been surrendered, or that the circumstances of this case warrant a disapproval of Agreement No. 8200 under section 15 of the Shipping Act. We rest our charge against Pacific Westbound solely on section 16 of the Act. Likewise, Far East violated section 16 of the Act, but here the violation results not from a failure to carry out the terms of an approvel agreement (as in the case of Pacific Westbound) but in Far East's failure to imple-

ment fully the terms of the supplemental agreements as we understand them. We have no difficulty, however, in finding this conduct on the part of Far East to be a violation of the Shipping Act. Section 16 does not specify that "any undue or unreasonable prejudice or disadvantage" shall flow from a failure to adhere to *approved* agreements.

We think that it would be a most unrealistic view to hold that Far East's conduct is without the scope of the Shipping Act, merely because it consisted of a failure to adhere to unfiled and unapproved agreements. Likewise absurd would be a holding that because the agreements were unfiled and unapproved, no violation of the Act could result from Far East's conduct. From whatever sources the violation arose, the conduct constituted "undue or unreasonable prejudice or disadvantage" and was in violation of the Act.[4]

IV. *Overland rates.*

The second supplementary agreement which we have found, *supra,* not to have been filed for approval concerns the maintenance of rate differentials for commodities from the overland territory.

[Discussion of this agreement is omitted. Discussion of modification of Agreement No. 8200 is omitted.]

The Examiner refers to the supplementary agreements as though they might be approved in their present form. However, their present form is far from definite. The supplementary agreements which we have found to have been unfiled and to have been required to be filed consist of oral agreements reduced to memoranda, in the form of abstracts or summaries of minutes of meetings. If it has been assumed that these are now before the Com-

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4. We note that Carnation has not filed a timely complaint for reparations under section 22 of the Shipping Act, 1916, and that such a complaint would now be barred by the two year Statute of Limitations in that section.

mission for approval, the assumption is misplaced. They are only before us in the form of exhibits in this record and cannot be treated as filed agreements. Filing pursuant to the regulations of the Commission is an essential prerequisite to an adjudication as to approvability. We find that on the basis of this record it is impossible to determine the scope of the unfiled supplementary agreements, the precise subjects covered by the agreements, the objectives to be achieved, and whether or not the agreements can be approved pursuant to the standards set forth in section 15 of the Shipping Act, 1916. We therefore reverse the Examiner to the extent that he found that Agreement No. 8200 should be reapproved after the amendments are filed. Should the parties to Agreement No. 8200 decide to file these supplementary agreements, they would then be in a form suitable for action by the Commission pursuant to section 15.

CONCLUSION

In summary, we conclude

(1) that the various supplementary agreements affecting overland rates, the concurrence procedures, and the placement of items on the initiative list, constitute unapproved agreements which should have been filed with us for action pursuant to section 15; and not having been so filed and approved the parties to Agreement No. 8200 are hereby ordered to cease and desist from carrying them out;

(2) the doctrine of administrative estoppel is inapplicable as regards so-called "tacit approval" by various members of the staff of our predecessor agency of these supplementary agreements;

(3) the right of independent action is preserved by Agreement No. 8200, as required by section 15 of the Ship-

ping Act, 1916, and neither party is found to ha
surrendered the right by means of a secret agreemen

(4) past conduct by respondents in regard to their tre
ment of Carnation Company has been in violation
section 16 of the Shipping Act, 1916;

(5) the Commission cannot at this time guarantee reapprov
of Agreement No. 8200 if the various supplementa
agreements are filed for approval, as the scope, conten
and procedures carried out under these agreemen
are uncertain; and

(6) there is insufficient evidence in the record before us
which to base disapproval at this time of Agreeme
No. 8200.

Respondents will be ordered to cease and desist from carryi
out their supplementary agreements until filed with and approv
by the Commission. An appropriate order will be entered.

A separate opinion concurring and dissenting with the majori
report will be issued on or about August 2, 1965, by Comm
sioner John S. Patterson.

[Separate opinion of Commissioner Patterson is omitted. H
agreed that the agreements other than No. 8200 were outsi
No. 8200, were required to be filed and approved, but were n
and were carried out.]

No. 872

JOINT AGREEMENT BETWEEN MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE
ORDER

Full investigation in this proceeding having been had, and the Commission on this day having made and entered of record a report stating its conclusion and decisions thereon, which report is hereby referred to and made a part hereof, and having found that the supplementary agreements affecting overland rates, concurrence procedures, and the placement of items on the initiative list constitute unapproved agreements which are required to be filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916,

Therefore, It Is Ordered, That the respondents, Far East Conference and Pacific Westbound Conference, cease and desist from carrying out such supplementary agreements until filed with and approved by the Commission.

By the Commission.

/s/ THOMAS LISI
Thomas Lisi
Secretary

(SEAL)

INDEX

787-478—65——1

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1965

CARNATION COMPANY, PETITIONER

v.

PACIFIC WESTBOUND CONFERENCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION

OPINIONS BELOW

The memorandum opinion of the district court (R. 137–138) [1] is unreported. The opinion of the court of appeals (R. 157–187), and its opinion on petition for rehearing (R. 200–201), are reported at 336 F. 2d 650.

JURISDICTION

The order of the court of appeals denying a rehearing was entered on September 28, 1964 (R. 200). The petition for a writ of certiorari was filed on November 6, 1964 and was granted on March 1, 1965 (R. 203; 380 U.S. 905). The jurisdiction of this court is conferred by 28 U.S.C. 1254(1).

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[1] "R." references are to the transcript of record.

QUESTION PRESENTED

Section 15 of the Shipping Act of 1916, as amended, requires carriers to obtain the approval of the Federal Maritime Commission before giving effect to any rate-fixing agreement and grants an exemption from the antitrust laws for any agreement approved by the Commission. The question presented is whether a shipper injured by a rate-fixing agreement which, the Commission has found, was unlawfully put into effect without its approval, may recover treble damages under the antitrust laws, or is restricted to the reparations remedy provided by the Shipping Act.

STATUTES INVOLVED

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 15, provides as follows:

> That any person who shall be injured in his business or property by reasons of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 15 of the Shipping Act, 1916, 39 Stat. 733, 46 U.S.C. (1958 ed.), 814, as it stood prior to its amendment in 1961,[2] provided in pertinent part:

> That every common carrier by water, or other person subject to this Act, shall file immediately with the [Federal Maritime Commission] a true

[2] Section 15 was amended in 1961 in certain respects not here material, 75 Stat. 763.

copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

* * * * *

All agreements, modifications, or cancellations made after the organization of the [Commission] shall be lawful only when and as long as approved by the [Commission], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto,

and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled, "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

STATEMENT

Petitioner, a shipper in foreign commerce, brought a treble damage action under the antitrust laws against two conferences of shipping lines and their carrier members, alleging injury as a result of secret, unapproved price-fixing agreements among the defendants. The conferences and member lines, as well as the Federal Maritime Commission, which had intervened as a defendant, moved to dismiss for lack of jurisdiction on the ground that the Shipping Act provides the exclusive remedy for the injuries resulting from rate-fixing agreements, whether or not these agreements have been approved by the Commission. The district court granted the motion and the court of appeals affirmed.

Petitioner's treble damage action, filed in 1962, arose out of disclosures made in a proceeding (Docket No. 872) instituted earlier by the Commission but not decided until July 1965, after this Court had granted certiorari in the instant case. Because of the close relationship between the matters covered by the Commission proceeding and the claims set forth in petitioner's complaint, and the relevance which the Commission report in Docket No. 872 may have to the appropriateness of deciding the principal issue before

the Court, a brief description of the Commission's report is included immediately after the description of the proceedings below.[3]

1. PETITIONER'S SUIT FOR TREBLE DAMAGES

a. THE FACTS ALLEGED IN THE COMPLAINT

Since the court below dismissed the complaint on motion, the allegations of the complaint must be taken as true. The facts recited are as follows:

Pacific Westbound Conference (PWC) and Far East Conference (FEC) are associations of ocean common carriers, each established under an agreement filed with and approved by the Commission pursuant to Section 15 of the Shipping Act (R. 16, 17–18). That section (*supra*, pp. 2–4) requires rate-fixing agreements among ocean carriers by water to be filed with the Commission and exempts approved agreements from the antitrust laws. The carrier members of the two conferences transport goods to the Far East—those in PWC from Pacific Coast ports and those in FEC from Atlantic Coast or Gulf ports (R. 16, 17).

Trade to the Far East from Atlantic Coast and Gulf ports is competitive with that from Pacific Coast ports (R. 18). In November 1952, the carrier members of PWC and of FEC entered into a joint agreement designated No. 8200 (R. 45–50), a memorandum of which was duly filed with and approved by the Commission (R. 18–19). The agreement provided

[3] The Commission's report is reproduced in the Appendix to petitioner's brief.

for joint conference action with respect to rates; however, it preserved the right of each conference, after notice to the other, to change rates independently (*ibid.*).

In January 1953, soon after Commission approval of Agreement No. 8200, the members of both conferences met and entered into a secret agreement not only to fix rates jointly but also to change rates on most items, including evaporated milk, only when both conferences agreed (R. 19–20). Pursuant to this agreement, in May 1957, PWC announced that the rates for the transportation of evaporated milk to the Philippines were increased $2.50 per ton (R. 21–22). In order to help meet European competition in the sale of evaporated milk, petitioner, a shipper of that product, requested PWC to reduce the rate to the pre-increase level. Although PWC was willing to grant petitioner's request, it declined to lower the rate because FEC would not concur in the reduction (R. 22). However, PWC did not disclose to petitioner that the real reason for not lowering the rate was FEC's refusal to concur; rather, PWC falsely informed petitioner that, after careful review, its own carrier members had agreed that no reduction was warranted (R. 23).

In October 1959, the Commission ordered an investigatory proceeding, numbered Docket 872, to determine whether Agreement 8200 "* * * is a true and complete agreement of the parties within the meaning of * * * section 15, and whether it is being carried out in a manner which makes it unjustly

iscriminatory or unfair * * *" (R. 39–40). Petitioner intervened in that proceeding in 1960 but did ot ask for an award of reparations (R. 41–42).

In May 1961, as a result of disclosures made during he Commission proceeding, petitioner learned for the rst time of the unlawful agreement and of the facts oncerning the rate increase and the refusal to grant rate reduction (R. 23). During this same month, lay 1961, the conferences agreed that evaporated milk e included on a list of "initiative" items, the consequence of which was to allow PWC to set and change he rate for this product without the concurrence of 'EC (R. 24). In May 1962, PWC reduced the rate n evaporated milk by $2.50 per ton, the amount of he increase in May 1957 (*ibid.*). In December 1962, etitioner filed this action, seeking three times the lamages it sustained for the period May 1957 to May 962 as the result of having been obliged to pay for he transportation of its products at rates unlawfully letermined (R. 25).

b. THE DECISIONS OF THE COURTS BELOW

The district court dismissed petitioner's complaint n the grounds that the "Supreme Court has held that he antitrust laws are superseded to the extent that the Shipping Act provides a remedy" and that the Shiping Act does provide a remedy for the carrying out f a rate-fixing agreement between carriers without pproval of the Commission (R. 137).

The court of appeals affirmed the dismissal. It held that the matters complained of were within the prinary jurisdiction of the Federal Maritime Commis-

sion" (R. 200), upon which "the Commission must necessarily employ a specialized judgment and a determination * * * not within the conventional experience of a judge or jury" (R. 181, 201). The court found it unnecessary, however, to resolve the question "whether there might ultimately arise out of the situation here presented a right to relief under the antitrust laws" (R. 187). In concluding that the complaint should be dismissed rather than retained on the district court's docket, the court of appeals stated (R. 187, n. 32):

> The only possible reason for allowing the action to be retained on the district court docket would be to avoid a claim that antitrust action was barred by the statute of limitations. Since we hold that such an action cannot at this date be maintained, this reason is not applicable here.

2. THE COMMISSION'S REPORT IN DOCKET NO. 872

After the Court's grant of certiorari in the instant case, the Commission rendered its report in Docket No. 872. After full administrative hearing, it held that PWC and FEC had in fact entered into a number of agreements relating to rate-making which were not within the purview of their earlier approved agreement (Agreement No. 8200) and which should have been submitted to the Commission for approval under Section 15 of the Shipping Act.[4] Included

[4] The Commission refused to approve the agreements in the pending proceedings on the grounds, among others, that they "consist of oral agreements reduced to memoranda, in the form of abstracts or summaries of minutes of meetings" and that "on

among these were the agreements challenged by Carnation which affected the fixing of rates for evaporated milk.

The Commission also held that FEC and PWC had subjected the petitioner as a shipper, West Coast ports as localities, and evaporated milk as a commodity, to unreasonable disadvantage in violation of Section 16 of the Shipping Act. It found that, despite persistent efforts, petitioner was unable to obtain from PWC a rate reduction for evaporated milk because of FEC's unwillingness to concur—not because PWC "was making its own decisions on rates based on the economics of shipment from the West Coast." FEC refused to concur in a rate reduction for evaporated milk shipped from the West Coast because such a reduction would adversely affect the rate FEC could charge for the movement of powdered milk from the East Coast.

Commissioner Patterson in a separate opinion agreed with the majority in all respects here material. He also expressed the view that the rate-fixing agreements which should have been, but had not been, submitted for Commission approval were not exempt from the antitrust laws.

The Commission ordered the respondents to "cease and desist from carrying out" their unfiled agreements "until filed with and approved by the Com-

the basis of this record it is impossible to determine the scope of the unfiled supplementary agreements, the precise subjects covered by the agreements, the objectives to be achieved, and whether or not the agreements can be approved pursuant to the standards set forth in section 15 * * *."

mission." It did not award reparations to Carnation. Under Section 22 of the Shipping Act, the Commission cannot award reparations on its own motion but only on the request of a complainant prior to or during the administrative proceeding. Although Carnation had intervened, it did not ask the Commission for a money award.

ARGUMENT

INTRODUCTION AND SUMMARY

The basic question raised in this case is what remedies are available to shippers when carriers subject to the Shipping Act, 1916 act under a rate-fixing agreement which has not been filed with or approved by the Federal Maritime Commission. In particular, the question is whether the power of the Commission to grant reparations forecloses a shipper's right to sue for treble damages under the antitrust laws.

It is the position of the Federal Maritime Commission that, under the Shipping Act, 1916, it has the exclusive and primary jurisdiction to determine whether conduct falls within the Shipping Act. It believes that, in order to best carry out a regulatory scheme regarding the ocean-commerce industry, jurisdiction should reside in the Commission to decide in all instances whether particular conduct is covered by an approved agreement. If the Federal Maritime Commission were to find that such conduct is not within the terms of an approved agreement, then that conduct would constitute a violation of the Shipping Act which provides penalties and remedies for

such violations. This is not to say, however, that one injured as a result of such conduct and after Federal Maritime Commission determination may not, in the Commission's view, have access to the courts under other statutes. As to that the Commission takes no position. The Solicitor General believes that the treble-damage remedies of the Clayton Act are plainly applicable so long as the court respects the primary jurisdiction of the Federal Maritime Commission to determine the rights and duties of carriers under the Shipping Act. His reasons for adopting this position are set forth below.

If the language of the Shipping Act alone were controlling, the answer would be clear; for Section 15 of the Shipping Act deals explicitly with the subject of antitrust remedies for price-fixing agreements, granting an exemption only for those agreements filed with, and approved by, the Federal Maritime Commission. The express exemption in the Act does not take into account, however, all the necessities of uniform application of the administrative scheme created by Congress. In light of these needs, the exemption has been broadened by decisions of this Court holding that, when judicial application of the antitrust laws threatens significant interference with the regulatory system administered by the Federal Maritime Commission, the antitrust proceedings cannot continue. *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474; *Far East Conference* v. *United States,* 342 U.S. 570.

An interference with the regulatory scheme of the Shipping Act is not, of course, a necessary conse-

quence of every possible difference between the results of judicial and administrative proceedings. There are two distinct situations: (A) If the court treats as unlawful what the Commission regards as authorized and proper conduct, the interference with the regulatory system is plain; (B) but if the court simply grants additional remedies for injurious conduct which the Commission has found to be unlawful, the judicial proceedings may further, rather than hinder, the operations of the Shipping Act. Our case falls into the second category.

A. That an unwarranted interference with the Shipping Act is the consequence of differing judicial and administrative definitions of what is lawful or unlawful for carriers is obvious; it is, moreover, the holding of *Cunard* and *Far East Conference*. Such interference is the likely consequence of any antitrust suit for an injunction, for the court is asked to enjoin conduct under a price-fixing agreement which might later be filed and approved by the Commission. Even if the carriers obtain Commission approval, they are forced to disobey the injunction in order to enjoy rights granted by the Shipping Act.

While the interference with the Shipping Act is less clear when a suit for treble damages, rather than an injunction, is brought by a shipper, the threat of interference remains significant. Where it is unclear whether an anticompetitive agreement has received Commission approval, a court might determine that it was not approved and accordingly penalize the carriers for acting under the agreement. The Commission, which has the basic responsibility for deter-

mining the scope of its approval of prior agreements and the need for seeking further approval of additional agreements, may conclude that the carriers required no further approval to act under the agreement. The carriers would then be penalized for conduct which the Commission regarded as authorized. That danger can be eliminated, however, if the treble-damage action is stayed—in any case in which the scope of prior Commission approval is uncertain—until the parties have invoked the primary jurisdiction of the Commission to determine whether a later agreement falls within the scope of a prior approved agreement and thus needs no further approval to be lawful. For then damages would be awarded only if the carriers' actions were determined, by the appropriate tribunal in each case, to violate both the Shipping Act and the Sherman Act.[5]

[5] The possibility of interference with the Shipping Act caused by an antitrust action *for an injunction* could also be eliminated, if the court (1) deferred to the primary jurisdiction of the Commission to determine if the agreement had been approved, and (2) even then, limited the scope of its injunction to forbidding actions under the agreement unless and until it is approved by the Commission. However, as this Court pointed out in *Far East Conference* v. *United States*, 342 U.S. at 576–577, there is little point in entertaining a suit for injunction under these limiting conditions. For, if the Commission, exercising its primary jurisdiction, finds the agreement was not approved, it will typically order the parties to cease and desist from giving effect to the agreement and thereby render the antitrust suit superfluous. As we shall show *infra* at pages 30–31, in *Far East Conference* this Court indicated that an antitrust suit for an injunction might be appropriate after the primary jurisdiction of the Commission had been invoked, if the Commission's order did not render an injunction unnecessary.

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B. There is a second way in which the results of judicial proceeding may differ from those of an administrative proceeding under the Shipping Act. Even if there is no possibility that the court would treat as unlawful what the Commission regards as lawful conduct—*i.e.* if, in any case of doubt as to whether an agreement has been approved, the treble-damage action is allowed to proceed only after the Commission itself has determined that carriers have acted under an unapproved agreement—the remedy granted by the court would differ from that granted by the Commission. While the Commission is empowered to award reparations under Section 22 of the Shipping Act to a shipper injured by any violation of the Shipping Act, a court would award *treble* damages if the violation involved acting under an unapproved price-fixing agreement in violation of Section 1 of the Sherman Act. That result, however, involves no irreconcilable conflict.

In the present case, the Commission has already determined that the carrier-defendants did not obtain the required approval of the price-fixing agreements which allegedly injured Carnation; there is no possibility that the result of the instant suit for treble damage may be to hold unlawful what the Commission regards as authorized. But the result of the present suit may well be the granting of a remedy for violations of the Sherman Act which differs from the remedy the Commission could grant under the Shipping Act. Thus the sole question presented here is

whether the remedies of the Shipping Act were intended to foreclose the remedies of the Clayton Act even in a situation in which application of the antitrust laws could in no way interfere with the Federal Maritime Commission's primary jurisdiction to determine the rights and duties of carriers subject to the Act.

If the Shipping Act itself said nothing relevant to a reconciliation of that statute with the Sherman Act, the question as to the exclusivity of the Shipping Act's remedies would, we believe, be a close one. Section 15 of the Shipping Act, which regulates competition among carriers by requiring prior administrative approval of any anticompetitive agreement, could be viewed as merely superimposing an administrative check on a generalized congressional approval of restraints on competition in the shipping industry. Even so viewed, the treble-damage remedy would provide an extremely useful weapon in enforcing compliance with the regulatory requirements of the Shipping Act. The treble-damage remedy plays an additional, equally important, role if Section 15 is viewed, as we contend, as expressing a limited congressional willingness to waive the general competitive policy of the Sherman Act only in those cases in which the Commission does not find anticompetitive agreements harmful. If Congress thus wanted competition to continue unless and until the Commission had approved an anticompetitive agreement, the treble-damage remedy was, of course, necessary and appro-

priate to require this competition.[6] The language of the antitrust exemption in Section 15 demonstrate that Congress adoped the latter approach to anti-competitive agreements; it both intended competition to prevail until an agreement had been approved and looked to the antitrust remedies as a method of enforcing the regulatory requirements of the Shipping Act.

Section 15 of the Shipping Act contains an express exemption from antitrust proceedings and this exemption is limited to proceedings challenging agreements which have been filed with the Commission and have received its approval in accordance with the standards set forth in that section. Congress carefully refrained from extending that exemption to actions under unapproved agreements. This was in accordance with the philosophy of Congress in passing the Act—that, while some agreements controlling competition in the maritime industry may have more virtues than vices,

[6] It could be argued that in some cases a failure to file an agreement would be a mere technical default resulting from a good-faith belief that a perfectly proper agreement need not be filed, and that in such cases the more appropriate remedy would be that under the Shipping Act. But, frequently a failure to file an agreement is an action taken in bad faith in order to conceal the fact that the agreement was in violation of both the Sherman Act and the Shipping Act, and in the hope of maintaining the secrecy required to effectuate such an unlawful agreement. In this event, the treble-damage remedy is obviously more appropriate. Even in the absence of any relevant statutory language, we would believe that the better view, as a matter of policy, would be to treat all unapproved agreements as subject to the Sherman Act, simply because of the ease with which carriers could eliminate the ambiguity as to their intentions by filing all agreements which might possibly require the approval of the Commission.

no such agreement should be tolerated until it has been submitted for public scrutiny, and approved by an agency entrusted by Congress with the protection of the public interest. Allowing the treble-damage remedy for unapproved anticompetitive agreements provides valuable private sanction for inducing carriers to submit their agreements to public scrutiny and thereby bring them under more effective governmental supervision, as contemplated by Congress.

Thus, Congress has specified the result in a case such as this. The remedies of the Shipping Act for actions under an unapproved, anticompetitive agreement are not exclusive; the treble-damage remedy of the Clayton Act is available to a shipper so long as the primary jurisdiction of the Commission is respected. This is not to say, of course, that a shipper must be allowed *both* an award of reparations and a judgment of treble damages; a shipper may, perhaps, be required to elect between these remedies. If he chooses to ask the Commission for reparations—and Section 22 does not permit the Commission to award reparations on its own motion—the award of reparations might be considered as eliminating the damages which otherwise would be tripled in a Clayton Act proceeding. But this question cannot arise, and need not be resolved, in a case such as this where the shipper has not asked the Commission for an award of reparations.[7] Here, we submit, the right to treble damages is clear.

[7] Moreover, the two-year limitations period for reparations claims under Section 22 has run on Carnation's claim.

I

THE SHIPPING ACT DOES NOT REPEAL BY IMPLICATION THE TREBLE-DAMAGE REMEDY GRANTED BY THE ANTITRUST LAWS FOR INJURIES RESULTING FROM RATE-FIXING AGREEMENTS WHICH HAVE NOT BEEN FILED WITH AND APPROVED BY THE COMMISSION

A. THE LANGUAGE AND PURPOSES OF THE SHIPPING ACT SHOW THAT ADMINISTRATIVE APPROVAL OF ANTICOMPETITIVE AGREEMENTS AMONG CARRIERS IS A NECESSARY CONDITION OF EXEMPTION FROM THE NORMAL REQUIREMENTS OF THE ANTITRUST LAWS

1. *The background of the Shipping Act.* The Shipping Act was passed following an exhaustive investigation into shipping combinations undertaken by the House Committee on Merchant Marine and Fisheries under the chairmanship of Congressman Alexander. See H. Res. 425 and H. Res. 587, 62d Cong., 2d Sess. After extensive hearings, the Committee issued a report,[8] in which it found that it was the practice of steamship lines to operate under conférence arrangements and agreements for the purpose of regulating competition, and that the conference lines had been guilty of many abuses, including abuses resulting from secret agreements rather than open ones "made with the full knowledge of some legally constituted authority * * *" (Alexander Report, 307, 415, 417).[9] The Committee noted that many advantages were claimed

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[8] House Committee on Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. No. 805, 63rd Cong., 2d Sess. ("Alexander Report").

[9] The findings of the Alexander Report are summarized in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 487-490. See, also, *Report on the Ocean Freight Industry*, H. Rep. No. 1419, 87th Cong., 2d Sess., 8-14.

to result from the use of the conference arrangements and that these advantages were not likely to be preserved by open competition.[10] In its view, these advantages could be secured only by permitting the lines to cooperate through some form of rate and pooling agreements. It repeatedly emphasized, however, that preservation of the advantages and elimination of the abuses connected with the operation of the conference system required effective governmental supervision and control. The Report states (*id.*, 417–418):

> While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the Committee show that they must be recognized. In nearly all the trade routes to and from the United States the conference lines have virtually a monopoly of the line service.

Its philosophy, in brief, was that, while conference agreements may offer greater advantages than disadvantages to the public, they should not be permitted unless and until they have been scrutinized and ap-

[10] The advantages enumerated were "regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination." Alexander Report, p. 416.

proved by a governmental body charged with protecting the public interest.

2. *The language of Section 15.* In passing the Shipping Act, Congress followed the approach recommended by the Alexander Committee.[11] It did not prohibit the conference system. Rather it required persons subject to the Act to obtain prior Commission approval of rate-fixing, pooling, and other anticompetitive agreements, and exempted from the antitrust laws only such agreements as are approved by the Commission.

Section 15 states that all "agreements * * * shall be lawful only when and as long as approved by the [Commission], and before approval or after disapproval it shall be unlawful to carry out in whole or in part * * * any such agreement * * *. Every agreement * * * lawful under this section shall be excepted from the provisions of [the antitrust laws]."

As a matter of statutory construction, the phrase limiting the exemption to agreements "lawful under this section" precludes treating the exemption as also applicable to unlawful (*i.e.,* unapproved) agreements. By explicitly providing that lawful agreements are exempt, Section 15 plainly implies that unapproved and therefore unlawful agreements are not excepted from the antitrust laws. For Congress could easily have said that "Every agreement * * * of the type enumerated in this section shall be excepted from the

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[11] See H. Rep. No. 659, 64th Cong., 1st Sess., p. 27, and S. Rep. No. 689, 64th Cong., 1st Sess., p. 7, accompanying H.R. 15455, which became the Shipping Act, 1916; *Isbrandtsen, supra,* 356 U.S. at 490, n. 11.

provisions of the antitrust laws," or "Every agreement * * * lawful or unlawful under this section shall be excepted from the provisions of the antitrust laws." Indeed, in the course of reviewing the provisions of the Shipping Act, this Court has taken it for granted that Section 15 means what is says. It noted with respect to the language defining the scope of the exemption that nothing short of approval—not even filing—is sufficient to exculpate conduct from the antitrust laws. *United States* v. *American Union Transport,* 327 U.S. 437, 445–447. The Court said (327 U.S. at 447, n. 8):

> It should not be necessary to emphasize, in view of the statute's plain language, that * * * the exemption arises *not* upon the mere filing of the agreement *but only after approval* by the Commission. [Emphasis in original.]

In so noting, this Court was merely restating a doctrine of statutory construction previously applied in *United States* v. *Borden Co.,* 308 U.S. 188, in a context closely analogous to this. In *Borden,* the district court had dismissed certain counts of an indictment under the Sherman Act on the theory that the Agricultural Marketing Agreement Act, 50 Stat. 246, 7 U.S.C. 671, *et seq.,* had given the Secretary of Agriculture plenary power over the marketing of milk, and that as a result such marketing "is removed from the purview of the Sherman Act." (308 U.S. at 197) But the antitrust exemption for marketing agreements, like Section 15 of the Shipping Act, was expressly limited to agreements approved by the officials charged with administering the statutory program. Speaking for the

Court, Chief Justice Hughes stated that "the Agricultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable. * * * These explicit provisions requiring official participation and authorization show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so." 308 U.S. at 200, 201.

The Congressional purpose in imposing explicit limits on the antitrust exemption of the Shipping Act is, moreover, the same as that explaining the limited scope of the exemption for agricultural marketing. Anticompetitive agreements approved by administrative officials charged with regulating an industry are very different from unapproved agreements. In *Borden,* Chief Justice Hughes explained (308 U.S. at 199):

> The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce * * *. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner. * * * To carry out that policy [of the Agricultural Act] a partciular plan is set forth. Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements they desire, regardless of the restraints which may be inflicted upon commerce. The statutory program to be followed * * * requires the participation of the Secretary of Agriculture * * *.

For identical reasons, the Court of Appeals for the District of Columbia Circuit has more recently read Section 15 of the Shipping Act as requiring public scrutiny and approval as a condition of exemption. *Isbrandtsen Co., Inc.* v. *United States,* 211 F. 2d 51, 57, certiorari denied *sub nom. Japan-Atlantic & Gulf Conference* v. *United States,* 347 U.S. 990. The Commission is "the agency entrusted with the duty to protect the public interest," it said, and the condition upon which it is authorized to legalize antitrust violations is to (*ibid.*):

> scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal *per se.*

It is hardly necessary to add that this reading of the statutory language is reinforced by more recent cases emphasizing that "[i]mmunity from the antitrust laws is not lightly implied" (*California* v. *Federal Power Commission,* 369 U.S. 482, 485), because these laws reflect a deep-seated and abiding mistrust of monopoly power (*United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348; *Pan American World Airways* v. *United States,* 371 U.S. 296, 324 (dissenting opinion)) and therefore this Court will "not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one." *California* v. *Federal Power Commission,* 369 U.S. 482, 485.

3. *The function served by the treble-damage remedy in furthering the purposes of Section 15.* Congress' purpose of achieving effective governmental supervision of anticompetitive agreements was served and strengthened by providing that only approved agreements are exempt from the antitrust laws. The availability of the treble-damage remedy in a case such as this has the desirable effect of encouraging injured parties to invoke a valuable private sanction that is of great aid in eliminating abuses which have long plagued shippers. Cf. *Silver* v. *New York Stock Exchange,* 373 U.S. 341; *Hewitt-Robins* v. *Freight-Ways,* 371 U.S. 84, 89. The importance of this method of enforcing regulatory requirements has frequently been recognized by Congress and this Court. In *Bruce's Juices* v. *American Can Co.,* 330 U.S. 743, 751, for example, this Court stated:

> Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute are identical with the public interest in having a statute enforced, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement. * * *

In dealing with concealed agreements in the shipping industry, Congress had particular reason to wish to give private interests a strong incentive to combat transgressions by other private interests—an incentive which the treble-damage remedy obviously provides

to a far greater extent than does mere reparations—for the very secrecy of concealed agreements makes purely governmental enforcement a somewhat uncertain safeguard of the public interest. Congress has, for fifty years, condemned secret agreements, "for shippers have no means of knowing whether the conditions claimed by the lines for such * * * agreements are true or not * * *." It has required open agreements "made with the full knowledge of some legally constituted authority in order (1) to safeguard the interests of shippers * * *."[12] Yet the abuses of 1916 are still prevalent today.[13]

The importance of the treble-damage remedy to eliminate the use of concealed agreements which the Commission might not otherwise discover is shown by this case. If petitioner and other similarly situated shippers can recover triple damages for injuries resulting from the failure to file agreements that restrain competition, it is plain that carriers are far less likely to conceal their agreements from the Commission. On the other hand, it would serve no purpose of the Shipping Act to conclude that although the Act explicitly immunizes only approved agreements from liability for antitrust treble damages, it impliedly immunizes unapproved agreements from

[12] H. Doc. No. 805, 63d Cong., 2d Sess., pp. 307, 417; *Report on the Ocean Freight Industry*, H. Rep. No. 1419, 87th Cong., 2d Sess., p. 382.

[13] Cf. H. Doc. No. 805, 63rd Cong., 2d Sess., pp. 417–421; S. Rep. No. 689, 64th Cong., 1st Sess., pp. 9–11; H. Rep. No. 659, 64th Cong., 1st Sess., pp. 29–31; H. Rep. No. 498, 87th Cong., 1st Sess., pp. 5, 6–7; H. Rep. No. 1419, 87th Cong., 2d Sess., pp. 381–399.

such liability. "For Congress had specified the precise manner and method of securing immunity. None other would suffice." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226–227. See also, *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51, 56–57 (C.A.D.C.), certiorari denied *sub nom. Japan-Atlantic & Gulf Conference* v. *United States,* 347 U.S. 990.

B. THIS CASE IS NOT CONTROLLED BY *CUNARD* AND *FAR EAST CONFERENCE,* BOTH OF WHICH INVOLVED SUITS TO ENJOIN CONDUCT WHICH THE COMMISSION MIGHT APPROVE AND AUTHORIZE

The policies of the Shipping Act are furthered—and there is no danger of interference with the regulatory scheme—when a court entertains a treble-damage action under the antitrust laws attacking conduct under an agreement which indisputably violates, or which the Commission has found violates, Section 15 of the Shipping Act. The effect is merely to provide an additional remedy for conduct which the Commission has condemned or would surely condemn. The situation is very different, however, if the judicial remedy sought is a permanent injunction against conduct which the Commission may later wish to authorize. There, the court is asked to prohibit what the Commission is empowered to permit, and the conflict is immediate and significant. That was the situation in *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474, and *Far East Conference* v. *United States,* 342 U.S. 570, which the courts below believed were applicable here.[14]

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[14] Similarly, *American Union Transport* v. *River Plate and Brazil Conference*, 126 F. Supp. 91 (S.D.N.Y.), affirmed *per curiam*, 222 F. 2d 369 (C.A. 2), held that a shipper could not recover treble damages under the antitrust laws despite a claim

Both *Cunard* and *Far East Conference* involved suits for injunctions under the antitrust laws challenging the actions of carriers under anticompetitive agreements which had not been approved by the Commission. In both cases, this Court held that the antitrust suit should not proceed, at least pending an invocation of the primary jurisdiction of the Commission, on the ground that the Commission might well approve the conduct which the court was being asked to enjoin. The court was in no position to decide for itself whether the particular agreements were lawful under the Shipping Act, as this Court demonstrated in *Cunard* (284 U.S. at 485):

> The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal.

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that defendant's action was unlawful under the Shipping Act, and had not been approved as required by that Act. The court felt that the question was settled by *Cunard* and *Far East Conference.*

Restating this principle in *Far East Conference,* the Court explained that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over" (342 U.S. at 574).

Thus it was the holding of these cases that a court could not properly enjoin the application of agreements which might be approved under the Shipping Act and could not determine, without preliminary recourse to the Federal Maritime Commission, whether the agreements would be authorized under the Shipping Act. The regulation of ocean transportation does in fact call for a high degree of technical and expert knowledge. Accordingly, Congress entrusted the administration of the Shipping Act to an "administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal." *Cunard,* 284 U.S. at 485; *Far East,* 342 U.S. at 574–575. A related goal was the achievement of uniformity and consistency of regulatory policy. *Cunard, supra,* 284 U.S. at 482–483; *Far East, supra,* 342 U.S. at 574–575. To grant the remedy sought in those cases—an antitrust injunction—might well frustrate this need for expertise and uniformity. By awarding such relief, an antitrust court might enjoin conduct which the Commission was empowered to approve and to authorize after approval. There would thus be a direct clash between the order of a court and the powers of the administra-

tive agency. Even if the injunction were limited to prohibiting action under the agreements until they were approved, the court might well be enjoining conduct which the Commission regarded as authorized by other agreements previously approved.

These considerations are not present when the antitrust remedy sought, unlike the remedy desired in *Cunard* and *Far East Conference,* is the retrospective remedy of treble damages and when the court respects the primary jurisdiction of the Commission to determine, in doubtful cases, whether the conduct has been approved. Thus, in situations such as this one, where the treble-damage action arises from conduct carried out under an unapproved agreement, uniformity of regulation and the implementation of expertise are not threatened by the danger that a court will stop defendants from performing action which the Commission deems lawful. Section 15 states that it is unlawful to carry out unapproved agreements, so that the Commission could never make such agreements lawful as to past operations. See, *River Plate and Brazil Conferences* v. *Pressed Steel Car Co.,* 227 F. 2d 60, 63 (C.A. 2).[15] Even when carriers claim that the challenged agreements have in fact been approved, there is no occasion for conflict between the court and the agency. If the agency's position on the claim has not been made clear in previous decisions, or if the agency's expertise

[15] Of course, by approving an agreement that has previously been carried out without approval, the Commission can legalize future operations under that agreement. But this creates no court-agency conflict because the antitrust remedy applicable to future conduct—the injunction—is withheld, and the treble-damage remedy applies only to past, unlawful conduct.

is otherwise relevant, the agency undoubtedly has primary jurisdiction to determine the validity of the claim and the court would necessarily defer action in accordance with well-settled doctrine.[16] This is all that is required to preserve uniformity of regulation and expertise in administration.

Indeed, that the policies requiring reconciliation of the Shipping Act and the antitrust acts might be wholly served by invocation of the doctrine of primary jurisdiction was suggested by the Court in *Far East Conference.* The Court noted, as to anticompetitive shipping practices, that "the facts after they have been appraised by specialized competence [may] serve as a premise for legal consequences to be judicially defined" and rested its opinion upon the ground that "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." 342 U.S. at 574, 575. Apparently recognizing that the antitrust remedies were not wholly superseded, and that even an injunctive remedy might be appropriate after preliminary resort to the Commis-

[16] In *Hewitt-Robins* v. *Freight-Ways*, 371 U.S. 84, 88–89, this Court described, with apparent approval, a procedure whereby the Interstate Commerce Commission takes primary jurisdiction to resolve technical questions requiring special competence, and a court then awards damages.

sion, the Court noted that "we may either order the case retained on the District Court docket pending the [Commission's] action, * * * or order dismissal of the proceeding brought in the District Court" (*id.* at 576–577). The Court chose the latter alternative, because "[a] similar suit is easily initiated later, if appropriate" (*id.* at 577). The Court's statement that the appropriateness of a later suit was an open question emphasizes that the only question decided was that primary jurisdiction lies with the Commission, and that the case does not hold that antitrust remedies are wholly superseded. That statement also qualifies what had been said earlier in *Cunard* (284 U.S. at 485)—that, for the injuries there claimed to justify an injunction "the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws."

Whether or not an antitrust injunction is ever appropriate after preliminary resort to the Federal Maritime Commission, there is no reason why the treble-damage remedy of the Clayton Act should be foreclosed once the Commission's primary jurisdiction to determine the rights and duties of the carriers has been recognized and respected. In this circumstance, the treble-damage remedy poses no conceivable threat to a uniform application of the Shipping Act or to the more expert judgment of the Commission. Indeed, this remedy will abet the purposes of the Shipping Act and insure the desired exercise of the Commission's regulatory responsibilities by inducing carriers to submit their agreements for approval or disapproval by the Commission.

II

THE ISSUE IS RIPE FOR DECISION

In the memorandum for the Federal Maritime Commission filed in response to the petition for a writ of certiorari, we urged that it was premature for the Court to decide the substantive issue whether the Shipping Act's remedies foreclosed the treble-damage action under the antitrust laws. We pointed out that the Commission's rulings in the proceeding then pending before it, Docket 872, might render that issue moot[17] and would, in any event, "prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court * * *". *Federal Maritime Board* v. *Isbrandtsen Co., Inc.* 356 U.S. 481, 498. After the Court granted the writ of certiorari, however, the Commission decided Docket 872. It held, among other things, that the respondent conferences had in fact entered into a number of rate-making agreements which were not authorized by Agreement No. 8200 and that these had not been submitted to the Commission for approval, as required by Section 15. Its decision has therefore not mooted the issue. Rather, it has reinforced petitioner's claim.

We believe that in the circumstances of this case the public interest would be best served by a resolution of the issue presented at this time. It is true that the Commission's decision is still subject to judicial review under the Hobbs Act, 64 Stat. 1129, as

[17] By a ruling, for example, that the allegedly unlawful agreements come within the scope of Agreement No. 8200, which had received the Commission's approval.

amended, 5 U.S.C. 1032. However, in view of the deference given conclusions of specialized agencies and the limited scope of review (*United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U.S. 111, 130–131; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297), the chances are slight that a court will overturn the Commission's finding that the agreements were unapproved, especially since the issue involves the Commission's determination of the meaning of its own approval of a prior agreement (Agreement No. 8200). See *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Commission,* 314 F. 2d 928, 935 (C.A. 9); *Swift & Co.* v. *Federal Maritime Commission,* 306 F. 2d 277, 281 (C.A.D.C.); *American Export & Isbrandtsen Lines* v. *Federal Maritime Commission,* 334 F. 2d 185, 197–199 (C.A. 9).

On the other hand, postponing decision of the question whether the antitrust damage remedy has been impliedly repealed would force petitioner to undergo once more the lengthy and expensive process of relitigating that question in the district court and the court of appeals. Moreover, it is important to the maritime industry—shippers, carriers and the Commission alike—to obtain a prompt decision by this Court on the question. Considering the importance of the issue, the fact that the Commission has rendered its report, and the unlikelihood that a court would overturn the Commission's ruling, we believe it is appropriate for the Court to decide at this time whether the antitrust treble damage remedy is available.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 20

CARNATION COMPANY, a corporation,
Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Brief of Respondent Pacific Westbound Conference

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In the Supreme Court of the United States

October Term, 1965

No. 20

Carnation Company, a corporation, *Petitioner*, vs. Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener, *Respondents.*	

Brief of Respondent Pacific Westbound Conference

QUESTION PRESENTED

The complaint, seeking treble damages, alleges violations of the antitrust acts which are also violations of the Shipping Act. The Shipping Act provides remedies and penalties for such violations. The question presented is: Did not the district court, as affirmed by the unanimous decision of the Court of Appeals for the Ninth Circuit, correctly hold that

the remedies and penalties of the Shipping Act here supersede the remedies and penalties of the Sherman Act and that the Federal Maritime Commission has exclusive primary (original) jurisdiction of the matter subject to appeal to the circuit courts?

The Solicitor General has now introduced a further question: Where the Commission, since the holding of the courts below, has found that the ocean carriers have put into effect an agreement prior to approval of the Federal Maritime Commission in violation of Section 15 of the Shipping Act, and also in violation of Section 16 of the Shipping Act, are the remedies and penalties under the antitrust acts in addition to the remedies and penalties under the Shipping Act thereby made applicable?

STATEMENT OF CASE

The district court dismissed petitioner's complaint which alleged that respondents agreed to and did fix ocean freight rates in violation of the antitrust laws (Sherman Act, §§ 1 and 2, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1 and 2 (1958); Clayton Act, § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958)). The complaint also alleged a failure to file with and obtain approval from the Federal Maritime Commission of agreements as required by Section 15 of the Shipping Act, 1916 (39 Stat. 733 (1916), as amended, 46 U.S.C. § 814 (1958) (hereinafter, "Section 15")[1]) (R. 21).

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1. All references to the Shipping Act should be taken as excluding the 1961 and 1964 amendments thereto (unless otherwise indicated), which are not applicable to the case before the Court. Section 15 of the Act requires that common carriers by water file with the Federal Maritime Commission agreements "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition, . . .

Petitioner is a shipper. Respondents are steamship rate making conferences and their member lines engaged in ocean commerce from the West Coast of the United States (Pacific Westbound Conference (PWC)) and from East and Gulf Coast ports (Far East Conference (FEC)) (R. 16, 17). The Federal Maritime Commission intervened as a defendant (R. 33-35).

PWC and FEC operate as rate making bodies pursuant to separate agreements approved by the Federal Maritime Commission or its predecessor agencies,[2] as required by Section 15 of the Shipping Act, 1916. The members of the two Conferences have further agreed in Federal Maritime Board Agreement No. 8200, approved by the Commission, to take joint action in establishing rates to the Far East (R. 39, 45-50, 182). Agreement 8200 provides that each Conference may, after notice, take independent action in changing rates, notwithstanding anything in Agreement 8200 (or rules and regulations to be adopted) to the contrary (R. 48).

The roots of this case lie in and the case is intimately related to an investigation of Agreement 8200 initiated by the Commission on October 26, 1959, more than three years preceding the filing of the complaint in this case (R. 37-40). The parties named in the Commission's Order of Investigation were virtually identical to respondents in this

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or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The Commission is directed to approve all such agreements that it does not find to violate stated standards. Agreements "lawful" under Section 15 are expressly excepted from the antitrust laws. (See also Shipping Act, 1916, § 14 (39 Stat. 733 (1916), as amended, 46 U.S.C. § 812 (1958) (hereinafter, "Section 14").)

2. The predecessor agencies include the United States Shipping Board, the United States Maritime Commission and the Federal Maritime Board. Hereinafter, the "Commission".

case (R. 9-11, 40). That Order recited that Agreement 8200, as approved, provides that the parties may

> "act jointly for the purpose of establishing the rates and rules and regulations relating to the transportation by them of commodities exported from the United States to Far East destinations. . . ." (R. 39.)

The stated purpose of the investigation was to determine: "whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of said Section 15" and "whether it is being carried out in a manner which" violates Section 15 or other provisions of the Shipping Act (R. 40).

Carnation intervened in the investigation of Agreement 8200 on August 16, 1960 (R. 41-44). In its Petition to Intervene Carnation cited its information that PWC's ocean freight rates and PWC's rules were the result of negotiations between FEC and PWC members and alleged that the negotiations were to the detriment of Carnation. Carnation subsequently participated fully as a party to the investigation (see R. 37-38). At no time, however, did Carnation avail itself of the opportunity to seek reparations[3] for violation of any section of the Shipping Act (*FMC Docket 872, Joint Agreement between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference,* 6 Pike & Fischer Shipping Regulation Reports (SRR) 99, 110 n. 4 (1965) (hereinafter, "Docket 872")).

On December 5, 1962, even before the Presiding Examiner had issued his decision in the investigation, Carnation filed its complaint in the instant case. The complaint sought

3. Carnation's right to seek reparations before the Federal Maritime Commission arises from Section 22 of the Act (39 Stat. 736 (1916), as amended, 46 U.S.C. § 821 (1958) (hereinafter, "Section 22")) and is discussed at length *infra,* section II-B-3.

treble damages and alleged that respondents entered into an unlawful agreement to fix and did fix ocean freight rates (R. 19-20, 21, 24-25). But, as the court of appeals stated and the Commission has now found, Agreement 8200 "expressly provided for and obviously contemplated the establishment of rates by agreements between both conferences"[4] (Court of Appeals Opinion, R. 183, see R. 182; Docket 872, 6 SRR 101-02; R. 39). Thus, the fixing of ocean freight rates alleged was carried out under an agreement approved under Section 15 of the Shipping Act and thereby expressly exempted from the antitrust laws.[5]

To avoid the barrier of Section 15 approval, Carnation alleged a secret agreement, unfiled with the Commission, under which PWC, contrary to the provisions of Agreement 8200,[6] gave up its right to take independent action on rates other than those on an "initiative list", which list did not until May, 1961 include the products shipped by Carnation.[7] *It is this alleged secret agreement which is the gravamen*

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4. As the Brief of the Solicitor General expresses it, "The agreement [8200] provided for joint conference action with respect to rates;" (S.G. Br. 5-6).

5. See Note 1, *supra.*

6. Paragraph 18(c) of Carnation's complaint reads:

"(c) That defendant PWC, contrary to the provisions of said Agreement No. 57 and said Agreement No. 8200, would make no change in any rate established by it or fixed as aforesaid and to be charged by its members for transportation of commodities by water from Pacific Coast ports of the United States to the Far East (Manila, Philippine Islands included), without the concurrence of defendant FEC, except a rate for a commodity included in a list established by defendants acting pursuant to said secret and unlawful association, combination, conspiracy and agreement and known as a 'list of initiative items' in respect of which defendant PWC might establish rates without the concurrence of defendant FEC;" (R. 20)

7. Carnation also alleged "That certain specified commodities should be on the . . . list of initiative items" referred to in the complaint as quoted in Note 6 (R. 20).

of the complaint, for it is alleged that, pursuant to it rather than pursuant to the approved agreements, in May, 1957 rates on products shipped by Carnation were raised $2.50 per ton, and a subsequent request for a rate reduction from PWC was rejected. At the time the motion to dismiss was granted and dismissal affirmed, the Commission had not determined whether the alleged secret agreement to forego independent action or the alleged understandings regarding the initiative list had been made. It had not yet determined whether if made subsidiary agreements respecting the machinery for placing items on the initiative list fell within the scope of approval of Agreement 8200. Such questions were the very essence of the Commission's investigation of possible Shipping Act violations under Agreement 8200.[8] The Commission's Order of Investigation specifically referred to the question whether Agreement 8200 was a "true and complete agreement of the parties" (R. 40).

The other aspect of the Shipping Act directly involved in the administrative investigation but also applicable to matters alleged in the complaint concerned discrimination and prejudice in the treatment of Carnation's rate request—unreasonable refusal by PWC to exercise its right to take independent action and failure of FEC to concur in granting Carnation a lower rate (see Docket 872, 6 SRR at 110). This conduct, scrutinized under Section 16 of the Act[9] (39

8. Carnation's counsel frankly acknowledged this fact during oral argument before the district judge. He stated:

> ". . . we are not pleading in the dark because we had documentation when we drew this Complaint, documentation which, indeed, was developed in a proceeding which is now pending before the Commission." (R. 102)

9. Section 16, in relevant part, makes it a misdemeanor, punishable by fine, "To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person,

Stat. 734 (1916), as amended, 46 U.S.C. § 815 (1958) (hereinafter, "Section 16")) and closely intertwined with Section 15 questions, was alleged as an antitrust violation by Carnation (R. 20, 22). As stated by the court of appeals below:

> "It thus appears that prior to and at the time of the institution of this action the Commission had under investigation substantially the same question as that sought to be raised by the complaint filed under the antitrust laws." (R. 161)

Respondents PWC and FEC accordingly moved to dismiss the complaint on the ground that the wrongs alleged were violations of the Shipping Act, which, with respect to the matters alleged, superseded the antitrust laws. Adjudication of the matters alleged was within the exclusive jurisdiction of the Federal Maritime Commission (R. 26-28). The Commission intervened as a defendant (R. 33, 108) and moved to dismiss the complaint on the grounds urged by PWC and FEC (R. 34-35).

On June 25, 1963, the district court granted the motions to dismiss filed by PWC, FEC and the Federal Maritime Commission (R. 138).[10] The dismissal was unanimously affirmed by the Court of Appeals for the Ninth Circuit (R. 157-87) and reaffirmed in an opinion denying Carnation's Petition for Rehearing (R. 200-201). Certiorari was granted by this Court on March 1, 1965 (R. 203).

Action by the Commission in Docket 872

The Federal Maritime Commission has now issued its Opinion and Decision in Docket 872, the administrative in-

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locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (See also Shipping Act, 1916, § 17, 39 Stat. 734, as amended, 46 U.S.C. § 816 (1958) (hereinafter, "Section 17").)

10. Carnation at no time below requested a stay.

vestigation of Agreement 8200. The Commission's opinion resolves all the questions raised by the complaint, but resolves them under the applicable provisions of the Shipping Act.

The Commission's Opinion rejects the complaint's charge that respondents, without Section 15 approval, "agreed upon and fixed rates for transportation by water . . . to the Far East." (R. 21, R. 19-20). The Commission, as the court of appeals also found self-evident,[11] held such agreement to be within 8200, saying,

> "By the terms of the agreement [8200], the parties thereto agree to establish from time to time 'rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates.'" (Docket 872, 6 SRR at 101-02.) (Compare, *e.g.*, Complaint, para. 18(b), R. 20.)

The Commission disposed of Carnation's claim of a secret agreement by which PWC gave up its right to take independent action on rate matters—the heart of the complaint—*by holding no such agreement ever existed:*

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11. As the court phrased it:

"It is plain that the arrangement provided for by agreement No. 8200 contemplated joint action in the establishment of rates. It recited that for the accomplishment of the purpose of this agreement 'it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates.'" (R. 182)

* * *

"We have noted that it . . . [Agreement No. 8200] expressly provided for and obviously contemplated the establishment of rates by agreements between both conferences. This approved agreement expressly provided that rates should be determined only by a concurrence of the two conferences each acting as a group and in accordance with the procedures prescribed by its conference agreement with respect to the establishment or change of rates." (R. 183)

> "We are unable to find any evidence of a secret agreement between Pacific Westbound and Far East that Pacific Westbound would give up its right of independent action. Such an agreement, we hold, has never existed. The right was created in Agreement 8200 in conformance with the statutory requirement, and it was never given up."[12] (Docket 872, 6 SRR at 108)

Recognizing that the Commission's decision rejected the essential antitrust contention, Carnation under date of August 30, 1965, petitioned the Commission for reconsideration of the finding that there was no secret agreement that PWC would give up the right to take independent action.

The Commission resolved the remaining questions raised by the complaint by finding violations of the Shipping Act. Respondents were held to have violated Section 15 by carrying out without Commission approval supplementary agreements relating to the initiative list and machinery governing the taking of joint action under 8200 (Docket 872, 6

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12. The Commission further stated: "This is not to say that the right had been surrendered, or that the circumstances of this case warrant a disapproval of Agreement No. 8200 under section 15 of the Shipping Act." (6 SRR at 110) And:

"(3) the right of independent action is preserved by Agreement No. 8200, as required by section 15 of the Shipping Act, 1916, and neither party is found to have surrendered the right by means of a secret agreement;" (6 SRR at 112)

In the Solicitor General's "Memorandum for the Federal Maritime Commission on Cert." the alleged secret agreement is said to be the understanding whereby PWC "surrendered its right to act independently except with respect to certain commodities" (p. 2). "The questions involved in the case" are stated as "[1] whether the alleged secret agreement between Pacific and Far East 'was made in fact; [2] whether, if made, it was contrary to Agreement 8200; and finally, [3] whether it would be required to be filed with and approved by the Commission' (Pet. App. 31)" (S.G. Mem. on Cert., p. 4). Obviously the last two questions are dependent on the first and since the Commission has found that this alleged secret agreement never existed, all questions said to be "involved in the case" were resolved by the Commission.

SRR at 107). All agreements remained subject to PWC's right to take independent rate action.

The door remains open, however, for future approval of the supplementary agreements. The Commission determined that the supplementary agreements must be refiled with it. It refused to state whether or not it would approve those agreements when and if filed.[13]

By its holding that the parties had carried out certain agreements beyond the scope of approved Agreement 8200 the Commission opened up the possibility that the penalties as provided in Sections 15 and 16 of the Shipping Act may be sought.[14] The Commission also indicated its willingness to grant reparations to Carnation, had Carnation sought them. The Commission observed that Carnation had failed to file a complaint for reparations under Section 22 of the Act (6 SRR at 110 n. 4).

SUMMARY OF ARGUMENT

The allegations of the complaint and the administrative investigation in which the complaint has its roots demonstrate why the only proper course for the district court was to dismiss the complaint. The case may be considered as of the time when the district court dismissed the complaint and the issues raised therein were under active consideration by the Commission. The case may also be considered as of the present, when the Commission has rejected the central antitrust allegation (a secret agreement under

13. The Commission paved the way for future approval by rejecting the Examiner's conclusion that supplementary concurrence agreements violated the 1961 amendment to Section 15 (75 Stat. 763 (1961), 46 U.S.C. § 814 (Supp. V, 1964)) requiring that Section 15 agreements include provisions preserving the right to take independent action (6 SRR at 108).

14. The penalty provisions of the Shipping Act are discussed in more detail *infra,* section II-B-3.

which PWC gave up the right in Agreement 8200 to take independent rate action) as factually unfounded; has determined that the agreement to act jointly in fixing rates was previously lawfully approved; and, has ruled that respondents' conduct complained of in other respects violates Section 15 of the Shipping Act and constitutes unreasonable prejudice and disadvantage in violation of Section 16 of the Act.

From either standpoint, the complaint raises a number of Shipping Act questions and asserts as an antitrust violation conduct prohibited by the Shipping Act. Under this pervasive regulatory statute, and with respect to the very conduct questioned by the complaint, the Federal Maritime Commission has, we submit, broader powers to act than do regulatory agencies in any other field. Specifically, by its order and decision, it could provide redress and issue cease and desist orders. The former it indicated willingness to do had Carnation only asked; the latter it did. Additionally, the Shipping Act provides massive penalties which, if the conduct warrants, can be far greater than the punitive two-thirds of the treble damage antitrust remedy.

Under the decisions of this Court the foregoing factors required the district court and the court of appeals to dismiss the complaint. The holdings, language, reasoning and policy considerations in the Supreme Court decisions all require the conclusion reached below.

Even assuming there were no governing decisions by this Court requiring dismissal here, the same result would be demanded by expressions by Congress that it intended the remedy for conduct violative of the Shipping Act to be exclusively the remedy provided by the Act. Dismissal accords with the Shipping Act's principal tenet that agreement on prices between competitors is not only an allowable,

but a desirable pattern for this particular industry. The Act therefore is inconsistent with intrusion of antitrust principles.

The position that antitrust remedies and penalties are required as additional weapons to enforce the Shipping Act is unacceptable to Congress. During a thorough review of the Shipping Act preceding its 1961 amendment, Congress rejected a specific proposal by the Department of Justice to add antitrust penalties and remedies to those provided by Section 15 of the Act. Instead, Congress amended the Act to reduce the already too rigid and too severe penalty provisions.

Neither policy considerations, reason, nor the equities of this case militate in favor of reversing the courts below and thereby departing from a long line of this Court's decisions and disregarding the commands of the Shipping Act's legislative history and recent expressions of Congress. To the contrary, full remedies and sanctions are available under the Shipping Act for the conduct here alleged. It is not rational to introduce antitrust precepts into a statutory scheme founded on the assumption that intercompetitor price agreement is desirable. To do so would cause practical procedural clashes between court and agency and violate other precepts of the regulatory scheme; most particularly, its condemnation of allowing shippers in any way to gain a competitive advantage over others by means of rebates, recoveries that more than make particular shippers whole, or any other departure from uniform rates equally applicable to all. It would, moreover, be unnecessary as well as unfair to subject persons covered by the Shipping Act, a regime designed by Congress to replace the antitrust laws, to both its regulatory sanctions and penalties and the similar provisions of the antitrust laws.

ARGUMENT

I. Decisions of This Court Require Dismissal of Appellant's Complaint Since the Shipping Act, 1916, Provides Exclusive Remedy for Wrongs Alleged

This Court has repeatedly required dismissal of complaints seeking remedies under the antitrust laws for wrongs based on violations of a regulatory statute and for which the statute provides sanctions and administrative remedies. The Shipping Act cases are classic examples. In *United States Nav. Co. v. Cunard S.S. Co.,* 284 U.S. 474 (1932), the plaintiff sought an injunction under the antitrust laws against an alleged unfiled agreement between steamship companies to charge "dual rates", *i.e.,* rates lower for shippers signing exclusive patronage contracts than for other shippers.[15] The Court held that the complaint must be dismissed because the Shipping Act provided the exclusive remedy for the wrongs alleged (*Id.* at 485-86). The Court specifically rejected the contention that the antitrust laws applied because the alleged agreement was unfiled and hence the express exemption in Section 15 was inapplicable:

> "But a failure to file such an agreement with the board will not afford ground for an injunction under § 16 of the Clayton Act at the suit of private parties—whatever, in that event, may be the rights of the government—since the maintenance of such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist. If there be a failure to file an agreement as required by § 15, the board, as in the case of other violations of the act, is fully authorized by § 22, supra, to afford relief

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15. The complaint in *Cunard* like that of Carnation here alleged a variety of wrongs, some of which constituted a violation of Section 14 as well as Section 15 of the Shipping Act. The "dominant facts", according to the Court, were covered by the Shipping Act (*Id.* at 483).

upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under § 31, for the first time, open to a judicial proceeding to enforce, suspend or set them aside. . . ." (*Id.* at 486).

The *Cunard* case was followed in *Far East Conference v. United States*, 342 U.S. 570 (1952). That case, arising on very similar facts, held that the *Cunard* ruling applied to suits for injunctions against agreements subject to Section 15 brought by the Department of Justice.

The Court has never questioned the holdings of these cases[16] and as recently as 1963 the Court reaffirmed their principle and cited them in its support in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). There, an antitrust suit was brought by the Department of Justice at the instance of the Civil Aeronautics Board, which believed that it lacked power to grant the relief desired. The district court ordered Pan American to divest itself of its stock holdings in Panagra Airlines. The Supreme Court construed the CAB's powers over unfair competitive activities in Section 411 of the Federal Aviation Act (72 Stat. 769 (1958), 49 U.S.C. § 1381 (1958)) as covering the conduct alleged. It then held that the CAB had exclusive jurisdiction to grant the relief sought in the antitrust action.

Activities "affected by an order" of the CAB under sections 408, 409 or 412 (49 U.S.C. §§ 1378, 1379, 1382 (1958)) are the only activities expressly exempted from the anti-

16. Carnation persists in its contention that *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958), somehow limits the holdings in *Cunard* and *Far East*. This strained attempt is aptly described by the court below as "entirely fallacious and altogether unsupportable". The circuit court succinctly summarizes petitioner's argument and the reasons why "The *Isbrandtsen* case had nothing to do with the present problem" but rather "dealt solely with the question of the legality of the dual rate system" (R. 168, text and note 12).

trust laws by the Act (49 U.S.C. § 1384 (1958)). There were no such orders. Notwithstanding Congress had thus provided a specific means for obtaining antitrust exemption, the Court properly held that these means were not exclusive and that under the doctrine of supersession of remedies the logic of the statutory scheme and the fact that the CAB could grant relief required dismissal of the antitrust action.[17] In so holding the court stated:

> "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course. See *United States Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474; *Far East Conference v. United States*, 342 U. S. 570, 577." (371 U.S. at 313 n. 19)

Reply to Carnation's and Solicitor General's Attempted Rationalization of Cunard-Far East

Carnation argues that *Cunard* and *Far East* lack continuing vitality and that those cases are inapplicable to treble damage actions (Pet. Br. 80-89). The Solicitor General suggests that the *Cunard - Far East* rule can be limited by confining it to suits for injunctions against agreements the Commission might later approve and to treble damage actions in which there is a question whether the agreement is already approved (S.G. Br., 12, 26-31). The possibility that the agency might later approve them would apparently be irrelevant insofar as a treble damage action is concerned.

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17. It can hardly be contended in the light of *Pan-American* that conduct subject to sections 408, 409 or 412 of the Act but unapproved by a CAB order thereunder would be subject to antitrust remedies simply because the Act specified such orders as a means of obtaining antitrust exemption. The *Pan-American* case involved conduct which would have been subject to sections 408, 409 and 412 had these sections been in existence at the time the conduct began. The Court read section 411 of the Act to cover sections 408, 409 and 412 questions. Therefore, it is inconceivable that *Pan-American* can be read as consistent with Carnation's view that strict compliance with provisions for express exemption is the only time antitrust remedies become unavailable.

This theory would create a new dichotomy between injunctions and treble damages under the antitrust laws which would be contrary to the cases and unsound in principle. Moreover we believe the proffered limitations of *Cunard* and *Far East* are seriously in error respecting the availability of either antitrust remedy to conduct subject to Shipping Act sanctions and remedies.

First, the criteria listed by the Court in *Cunard, Far East,* and *Pan American* do not support the Solicitor General's attempted rationalization of those cases as requiring dismissal of treble damage actions only if the Commission decides that any agreements alleged are already approved by the agency. Every factor listed in the three decisions as requiring dismissal of an antitrust complaint is present in the instant case in as great or greater degree: Carnation's complaint alleges wrongs that are violations of the Shipping Act;[18] a remedy was available before the Commission;[19] an appeal of the Commission's orders lies to the Courts.[20] The Act is pervasive or comprehensive in nature;[21] the uniformity of interpretation of the Act demands that the agency decide the questions raised and apply any sanc-

18. See 284 U.S. at 483-85 (*Cunard*); 342 U.S. at 574 (*Far East*); 371 U.S. at 305 (*Pan American*).

19. See 284 U.S. at 486 (*Cunard*); 342 U.S. at 574 (*Far East*); 371 U.S. at 309, 311, 312 (*Pan American*). Remedies are discussed *infra* at section II-B-3.

20. See 284 U.S. at 486 (*Cunard*); 342 U.S. at 572 n. 4, 574, 577 (*Far East*); 371 U.S. at 309 (*Pan American*). See Shipping Act, 1916, § 31 (39 Stat. 738 (1916), as amended, 46 U.S.C. § 830 (1958)).

21. See 284 U.S. at 480-81 (*Cunard*); 371 U.S. at 301, 304 (*Pan American*). This topic is discussed in detail *infra* at section II-B-1 and 2.

tions;[22] treble damage recoveries would amount to prohibited rebates;[23] the agency might in the future approve the conduct in question;[24] the agency has the expertise to determine the question raised in the light of the policy of the Act it administers and the dictates of a complex industry.[25] These factors are exhaustively discussed by the court of appeals in applying them to the facts of the instant case (R. 169-186).

Second, the Court has not suggested in the governing cases that supersession of antitrust remedies by remedies and penalties under a regulatory statute may apply to injunctions but not to treble damage actions if the agency might approve the conduct in question. Rather, the Court has looked to the question whether *remedies* and penalties are available. In the *Cunard* case, where the Court considered whether an injunction could be obtained against an unfiled Section 15 agreement, the Court's language referred both to treble damage actions and suits for injunctions. The Court then cited *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), a treble damage case. The *Cunard* decision pointed out that "a remedy" under the antitrust laws no longer exists, since it was replaced by Shipping Act remedies. The decision also stated that Shipping Act Section 22 "orders" by the Commission (which would include reparations

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22. See 284 U.S. at 482 (*Cunard*); 342 U.S. at 574-75 (*Far East*). Discussed *infra* at section II.

23. See 284 U.S. at 483 (*Cunard*). Discussed *infra* at section II-B-3.

24. See 284 U.S. at 487-88 (*Cunard*); 371 U.S. at 309 (*Pan American*). Discussed *infra* at section II.

25. See 284 U.S. at 485 (*Cunard*); 342 U.S. at 574-75 (*Far East*).

orders) respecting violations of the Act are for the first time open to a judicial proceeding in an action to review those orders (*Id.* at 485-86). Under the Solicitor General's proposed limitation of the *Cunard - Far East* rule, a treble damage action should go forward where, as in those cases, the agreement clearly had not been approved. The Court in *Cunard* nowhere mentioned such a possibility. Rather it used language that in unqualified terms rejected applicability of the treble damage remedy on grounds of the policy enunciated in the *Keogh* decision:

> "If a shipper were permitted to recover under the Antitrust Act, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. 'Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.'" (*Id.* at 483)

Notably also, the policy grounds given would require the conclusion that the treble damage remedy is superseded by Shipping Act remedies even if there is no possibility that the agreement in question may be approved.

Third, the Solicitor General and Carnation, relying on *United States v. Borden Co.,* 308 U.S. 188 (1939), argue Congress intended that antitrust exemption be obtained under Section 15 of the Shipping Act only by literal compliance therewith. That position is wholly inconsistent with the position that *Cunard* and *Far East* properly apply supersession to require dismissal of a suit for an injunction alleging an unapproved agreement but not a suit for treble damages. The fact that *Cunard* and *Far East* require an exception to the Solicitor's interpretation that compliance with the express exemption provides the only basis for a

dismissal of antitrust actions shows that this Court has emphatically rejected this approach.

Fourth, there is an entirely rational reason why Congress made an express exemption for approved agreements but not for unapproved agreements. Since by the time the Shipping Act was passed the doctrine of primary jurisdiction and supersession of remedies was firmly established, it was not necessary for Congress to provide express exemption from the antitrust acts for acting under unapproved Section 15-type agreements. That exemption was accomplished by providing remedies and penalties in the Shipping Act. By contrast it *was* necessary to include an exemption *after* approval because once the agreement is approved, it no longer constitutes a violation of the Shipping Act and there is, accordingly, no penalty or remedy provided which would supersede the antitrust remedies. The approved agreement might still, without more, be in violation of the antitrust acts. As a corollary, therefore, in order to avoid any conflict it was considered necessary to include the specific exemption for approved agreements.[26]

Further, the specific grant of exemption from the antitrust laws contained in Section 15 hardly leads to the

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26. The same reasons apply with even greater force to the 1961 amendment to Section 15 (*supra,* n. 13) adding agreements approved under new Section 14b (75 Stat. 762 (1961), 46 U.S.C. § 813a (Supp. V, 1964) (hereinafter, "Section 14b")) to the express exemption from the antitrust acts. Supersession was not only thoroughly established by the courts but vigorously called to the attention of the Committees considering the Act by the Chairman of the then Federal Maritime Board (see section II-A-2, *infra*). Accordingly, there is no merit to Carnation's suggestion that the 1961 amendments by including agreements under Section 14b within the express antitrust exemption somehow constitute a rejection of the supersession doctrine (Pet. Br., pp. 41-42).

conclusion that the antitrust laws apply to agreements violative of the section because unapproved. There is no indication in the legislative history that Congress intended such a result. It would be strange moreover to conclude that antitrust remedies are inapplicable to conduct subject to sections of regulatory statutes that do not mention the antitrust laws, but that antitrust remedies do apply where Congress provides an exemption. Such a result, absent some congressional expression that the antitrust laws would continue to apply, would mean that in the very instance where Congress thought antitrust concepts inappropriate they might be applied, and that in the situation where Congress did not advert to the question a court may invoke the doctrine of supersession of remedies.

If, for example, an antitrust complainant alleges that a defendant gave rebates illegal under Sections 14 or 16 of the Shipping Act, neither of which refers to the antitrust laws, the complaint must be dismissed as raising Shipping Act questions falling within the jurisdiction of the Commission, *Maddock & Miller, Inc. v. Mayer China Co.*, 241 F. Supp. 306 (S.D. N.Y. 1965). See, *e.g.*, *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922); *Terminal Warehouse Co. v. Pennsylvania R. R.*, 297 U.S. 500 (1936). Why should the result be different if a plaintiff alleges that rates are set pursuant to an unfiled Section 15 agreement? The *Cunard* case holds that there is no difference (see 284 U.S. at 486).

Fifth, the Solicitor's rationale is based on the erroneous assumption that the sole reason for the *Cunard - Far East* rule is avoidance of different, *i.e.*, conflicting, results by court and agency. But this is but one of many reasons given by the Court—reasons that ranged from legislative intent to protection of the uniformity of the rate structure and

avoidance of illegal preferences and rebates in the form of antitrust recoveries or settlements.

Sixth, assuming that the danger of a clash of court and agency were the sole criterion, we point in detail to the clash of Shipping Act and antitrust policy in section II-A below and to the practical procedural conflicts resulting from Carnation's and the Solicitor General's theories in section II-B-2 below. However, in passing, we emphasize that a treble damage award, more than an injunction, provides the opportunity for such a clash. A treble damage award is irreversible and can have devastating impact, particularly in an industry such as shipping that has required subsidy and other governmental aid by the United States and foreign governments merely to remain in existence.[27] An injunction against conduct that may be approved and removed by statute from the dictates of the antitrust laws may readily be vacated upon a showing to the court that the basis for its injunction no longer exists either because an enjoined agreement has received Commission approval or because a new agreement has been filed and approved.

With respect to the agreements the Commission did find to exist as unapproved Section 15 agreements, *i.e.*, concurrence machinery and placement of items on the initiative list, the Commission may very well approve them when

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27. In 1961 when the House Committee on Merchant Marine and Fisheries rejected a Justice Department sponsored amendment to Section 15 that would have made antitrust remedies applicable to unfiled Section 15 agreements, Representative Tollefson in attacking the measure referred to the vast sums involved in the *General Electric* litigation and expressed the view that Shipping Act penalties were more than ample. The Justice Department proposal was scuttled, never to reappear until issuance of the Solicitor General's Brief in this case (see Hearings Before the Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Representatives, on H.R. 4299, 87th Cong., 1st Sess. (1961) 470-71) (Discussed *infra* at section II-A-2).

they are formally filed. This is the very situation that existed in *Cunard* and *Far East,* where the dual rate agreements had not been presented to the Commission for assessment under Shipping Act standards. The same danger exists here as in *Cunard - Far East:* An antitrust award could precede Commission approval of the very agreements on which the antitrust award was based.[28] This was the situation that caused the Court in *Pan American* to state that it would be "strange, indeed" for an antitrust cause of action to exist for conduct that might subsequently be approved by the agency (371 U.S. at 309).

Seventh, it is the injunction cases which extended the supersession doctrine developed by the treble damage cases, not the reverse. The injunction cases were preceded by and their principles arise from decisions dealing with court suits for damages, first under common law causes of action and later under the antitrust laws (*e.g., Texas & Pac. Ry. v. Abilene Cotton Oil Co.,* 204 U.S. 426 (1907); *Keogh v. Chicago & N.W. Ry.,* 260 U.S. 156 (1922)). In the *Keogh* decision it was held that the remedy for injury resulting from unreasonably high rail rates set pursuant to an allegedly illegal conspiracy was reparations before the Interstate Commerce Commission and not a treble damage action under the antitrust laws. The *Keogh* decision, relied on in *Cunard,* shows the Solicitor General's rationale to be out of step with the supersession decisions and the reasons for these decisions. No possibility existed in *Keogh* that the conspiracy or agreement had received ICC approval. Indeed, the ICC had no express power to approve the conduct or to exempt it from the antitrust laws. The case rested on the Court's view of authorities such as the *Abilene* case

28. Assuming, of course, that an antitrust award would be proper in any event to punish carrying out the agreements the Commission found to exist.

and its view that a treble damage action would disrupt the administrative scheme set up by Congress. The same grounds governed the *Cunard* decision, which rested heavily on *Keogh* for support. It is also significant that by the time *Cunard* extended the supersession of remedies doctrine of *Keogh* to injunctions it was firmly established that the existence of administrative reparations required dismissal of treble damage actions.

Decisions of this Court and of the lower courts rendered since the *Cunard* case further stress that a proper accommodation of regulatory statutes and the antitrust laws more strongly requires dismissal of treble damage actions than suits for injunctions. In *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), Georgia brought an original action in the Court seeking both treble damages for and an injunction against an alleged rate fixing conspiracy by railroads. The resulting rates allegedly discriminated against the Southern States. The Court held that the suit for treble damages would not lie, relying on the *Keogh* case, but declined to dismiss that part of the complaint that sought an injunction because the particular relief sought was "not a matter subject to the jurisdiction of the [Interstate Commerce] Commission." (324 U.S. at 455).

In *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500 (1936), the railroad and Merchants Warehouse Co. operated under a preferential agreement. Terminal, a competitor of Merchants, obtained a cease and desist order from the ICC against the agreement, but was rebuffed in its claim for reparations against the railroad on the ground that it had not demonstrated actual loss. The ICC, however, had undoubted power to award reparations in an appropriate case. Terminal then sought antitrust treble damages both against the railroad and against Merchants. Reparations might also have been sought from Merchants

before the ICC, but Terminal, like Carnation here, failed to pursue that course. This Court held that the antitrust treble damage complaint should have been dismissed as to both the railroad and Merchants, since the antitrust violation was also a forbidden discrimination under the Interstate Commerce Act. In a statement that comes close to describing the instant case, the Court summarized:

> "Every act of wrongdoing proved in the new suit [antitrust activities] to have been committed by the defendants was proved against them also (with unsubstantial exceptions) in the case before the Commission." (*Id.* at 509).

The Court pointed out that treble damage recoveries against persons subject to the Interstate Commerce Act would amount to illegal rebates unavailable to competitors of the plaintiff (*Id.* at 512). The Court reasoned: A suit for an injunction under the antitrust laws is inconsistent with the provisions for cease and desist orders under the regulatory statute since the availability of antitrust injunctions would break down the unity of the regulatory system. Of great significance here, the Court then concluded: "The same considerations" apply "with undiminished force, where the suit under the Clayton Act is not for an injunction but for damages." Mr. Justice Cardozo then stated:

> "Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or water. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. *If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce*

Act like the Shipping Act embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive. If another remedy is sought under cover of another statute, there must be a showing of another wrong, not canceled or redressed by the recovery of damages for the wrong explicitly denounced. The opinions of this court in their fair and natural extension point to that conclusion." (*Id.* at 514-15).

To return to the specific context of the Shipping Act, a question identical to that now before the Court arose in *American Union Transp., Inc. v. River Plate & Brazil Conferences*, 222 F.2d 369 (2d Cir. 1955), *adopting opinion in* 126 F. Supp. 91 (S.D.N.Y. 1954). A complaint seeking treble damages under the antitrust laws for a conspiracy embodied in an allegedly unfiled Section 15-type agreement was dismissed. The same attempt was made to distinguish the *Cunard* and *Far East* cases on the basis that they involved injunctive actions. Like the court of appeals and the district court in this case, the Second Circuit rejected this distinction. Decisions in a number of other cases in the lower courts also conclude that the remedies under the Shipping Act are exclusive and preclude antitrust actions.[29]

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29. *Rivoli Trucking Corp. v. New York Shipping Ass'n*, 167 F. Supp. 940 (S.D. N.Y. 1956); *Rivoli Trucking Corp. v. New York Shipping Ass'n*, 167 F. Supp. 943 (S.D. N.Y. 1957); *United States v. Alaska S.S. Co.*, 110 F. Supp. 104 (W.D. Wash. 1952). See *Swayne & Hoyt v. Kerr Gifford & Co.*, 14 F. Supp. 805 (E.D. La. 1935); *Wisconsin & Mich. Transp. Co. v. Pere Marquette L.S.*, 67 F.2d 937 (7th Cir. 1933); *United States v. Borax Consolidated, Ltd.*, 141 F. Supp. 396 (N.D. Cal. 1955).

Eighth, the Solicitor General seeks to support the proffered limitation of *Cunard - Far East* by showing that it would further the purpose of the Shipping Act to provide additional treble damage remedies once the Commission had determined particular agreements to be unfiled. This view overlooks the fact that present remedies for carrying out unapproved agreements are fully adequate and are coupled with statutory penalties of unusual severity (see *infra,* section II-B-3), it fails to recognize that reparations are consistent with the Act's requirements of uniform treatment of all shippers and treble damages are inconsistent with these requirements, and it ignores the fact that the Commission takes the position that it will not accept for filing "routine" agreements merely implementing approved agreements.[30] Minutes of the supplementary agreements found by the Commission to exist in this case had been filed for informational purposes, but not for approval.[31] The antitrust club or "weapon" would result in deluging the Commission with the very "routine" agreements it has stated by rule[32] that it does not wish filed. Thus, the antitrust club proposed by the Solicitor General would create conflict either by requiring the Commission to accept *all* agreements for filing, contrary to its present rules and desires, or to relegate parties to such agreements to constant antitrust attack.

The suggestion that a new weapon is needed to aid the present energetic Commission in enforcing the Shipping Act is a suggestion properly to be made to Congress, not the Court. This the Department of Justice did in 1961 only to be rebuffed. Congress rejected statutory language that

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30. For further discussion see section II-B *infra.*

31. 6 SRR at 104, 106.

32. FMC Regulations for Filing Copies of Agreements Under Section 15, Shipping Act, 1916, 46 CFR § 522.6.

would have achieved this result, expressing the view that this had never been the law and was thoroughly undesirable (see *infra,* section II-A-2). Having failed to persuade Congress of the necessity for applying antitrust sanctions for violation of Section 15, the Department of Justice here asks the Court to accomplish this result.

The Solicitor General speaks of adding the punishment of treble damages to Section 15 sanctions and remedies, but his proposal does not rule out the additional "weapon" of criminal prosecution under the Sherman Act with attendant massive fines and possible jail sentences. This attempt to subject the ocean carriers to all of these additional penalties and sanctions flies directly in the face of the fact that Congress in 1961 *reduced* Section 15 penalties to "not more than" $1,000 per day because Congress was convinced that the old penalty was too severe, that Section 15 violations represent a wide range of culpability and that the $1,000 per day should be the maximum.[33]

Ninth, the Solicitor General's view is that where conduct may "later be filed and approved by the Commission" (S.G. Br., 12) injunctive relief under the antitrust laws may not be granted. Even this admission misses the central point of *Cunard* that Shipping Act remedies *replace* antitrust remedies. This position is confirmed by the policy, the logic and the wording of the Shipping Act, discussed *infra,* section II. *Cunard* and the policies enunciated therein require the conclusion that supersession of remedies applies whether or not the agency might later approve the conduct.

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33. 75 Stat. 763 (1961), 46 U.S.C. § 814 (Supp. V, 1964). See H.R. Rep. 498, 87th Cong., 1st Sess. 21 (1961):

> "Past experience has indicated that specific instances of violations of section 15, like instances of violations of other statutes, present wide ranges of culpability. We therefore believe that the penalty provision of this section should be stated in terms of a maximum rather than a fixed amount."

Tenth, the Solicitor General's position that the treble damage remedy exists in addition to Shipping Act penalties and remedies, even if accepted, is inapplicable in this case because the Commission found that the conduct complained of violated Section 16 of the Act. Section 16 prohibits subjecting shippers to "undue or unreasonable prejudice or disadvantage." (46 U.S.C. § 815 (1958)) The question presented is therefore exclusively a Shipping Act question (*e.g., Keogh v. Chicago & N.W. Ry.,* 260 U.S. 156 (1922); *Terminal Warehouse Co. v. Pennsylvania R.R.,* 297 U.S. 500 (1936)).

Borden, Socony-Vacuum and Great Northern Cases Inapplicable

Two cases are particularly stressed in the briefs of Carnation and the Solicitor General, *United States v. Borden Co.,* 308 U.S. 188 (1939) and *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). Reliance on these cases is misplaced, since they are not in point. Both cases involved criminal actions under the antitrust laws. In neither case was the agreement in question required to be filed for approval with the agency in question; correspondingly, there were no sanctions and remedies applicable upon failure to file. In neither case could the agreement in question conceivably have been filed and approved. In *Socony-Vacuum,* the statute providing a possible antitrust exemption had ceased to be operative for some years, and the conduct that was the subject of the antitrust prosecution continued long after the statute had terminated. In *Borden,* the agreement was not the type that could qualify for the statutory exemption from the antitrust laws, since the Secretary of Agriculture was not a party to the agreements in question.

Carnation also continues to rely heavily on *Great Northern Ry. v. Merchants Elevator Co.,* 259 U.S. 285 (1922).

The contention (Pet. Br., p. 28) is that the instant case, like *Great Northern,* is a simple overcharge question. *Great Northern,* however, could hardly be less applicable to this case. *Great Northern* involved no accommodation of antitrust and regulatory statutes; it involved no problems of prejudicial conduct under the regulatory act; the complaint there raised no questions for the administrative body to decide. *Great Northern* involved only the question whether one rail tariff item or another applied to a particular shipment. This was a question traditionally for the courts and of no concern to the Interstate Commerce Commission. The instant case is manifestly in an entirely different category.

II. Congress Intended Shipping Act Remedies to Supersede Antitrust Remedies

A. LEGISLATIVE HISTORY DEMONSTRATES SHIPPING ACT REGULATORY SCHEME INCONSISTENT WITH PRIVATE TREBLE DAMAGE ACTIONS

The Solicitor General has come forth with the novel suggestion that Congress intended to permit the treble damage remedy as a useful weapon in enforcing the Shipping Act, particularly as to agreements determined by the Commission to be within Section 15 and which have not been approved. This purported congressional intent is derived solely from the express exemption under Section 15 for approved agreements (S.G. Br. pp. 15-18). There is nothing in the legislative history to support this view.

1. Objectives of Sponsors of the Shipping Act, 1916

We are not aware of any single statement in the legislative history of the Shipping Act, 1916, which can be quoted as representing the views of the 1916 Congress on the narrow problem now before the Court: Do treble damage antitrust remedies apply, in addition to Shipping Act remedies and penalties, to conduct violative of Section 16 of the Act and to agreements violative of Section 15 of the

Act which may later be approved by the Commission? The legislative history shows, however, that the Act's sponsors believed that they had opted against the antitrust laws, replacing antitrust abhorrence of price fixing with a pervasive regulatory scheme founded on the contrary assumption that rate fixing was necessary and desirable. A fair reading of the legislative history as a whole points strongly to the conclusion that allowance of treble damage actions under the facts in this case would be violative of congressional intention. This intention is confirmed—with specific reference to the question in this case—by the legislative history of the 1961 and 1964 amendments to Section 15.

It is clear from the legislative history that the 1916 Congress was deeply concerned with the basic question whether antitrust concepts should be applied to steamship conferences or whether a radically different philosophy should prevail. This concern is reflected in the 1912 enabling resolutions authorizing the investigation that led to the Shipping Act, in the fact that the House Committee on Merchant Marine and Fisheries considered material furnished by the Department of Justice respecting antitrust actions brought against certain ocean carriers, in the report of the House Committee (the "Alexander Report", named after the Committee Chairman), and in a statement by Representative Alexander himself.[34]

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34. The enabling resolutions, H.R. Res. 425 and H.R. Res. 587 (62d Cong., 2d Sess. (1912)), are set forth in House Committee on the Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American and Domestic Trade Under H. Res. 587, H.R. Doc. No. 805, 63d Cong., 2d Sess. 8-9 (1914) (hereinafter "Alexander Report"). The Alexander Report discusses the question with particularity at pages 416-17. The materials furnished by the Department of Justice to the Committee related to *United States v. Prince Line, Ltd.*, 220 Fed. 230 (S.D.N.Y. 1915), and *United States v. Hamburgh-American S.S. Line*, 216 Fed. 971 (S.D.N.Y. 1914); see Senate Comm. on Commerce, Index to the

The Alexander Report concluded that the antitrust laws should not apply to agreements between steamship lines, that to apply the antitrust laws would either cause dislocative rate wars and destructive competition or lead to consolidation through common ownership, either course ending in monopoly. The Committee found that regularity of service and adequate investment in an industry with high fixed costs required an end to rate wars; that conference rate-making leads to stable rates that allow shippers to predict the cost of ocean carriage when making sales contracts abroad; that inter-carrier rate agreement reduces the likelihood of charging unremunerative rates designed to drive out weaker carriers; that such rate agreement helps eliminate preferential or discriminatory rates, providing uniform rates for all shippers regardless of size and power; that conference rate-making helps maintain a parity between rates from the U.S. and rates from other countries to a common destination; that the conference system eliminates wasteful competition; and, that conference rate-making agreements enable costs of service to be distributed more economically over the traffic available.[35] These advantages would be lost if the antitrust laws were to apply.

As Representative Alexander stated on the floor of the House in explaining the regulatory provisions of the Shipping Act, his committee was

> ". . . confronted with the question whether or not we should recognize the agreements existing between car-

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Legislative History of the Steamship Conference/Dual Rate Law, S. Doc. No. 100, 87th Cong., 2d Sess. 206 (1962), hereinafter "Legislative Index". The statement by Representative Alexander is quoted *infra.*

35. Alexander Report, *supra* note 34, at 293-302, 416-17. The recommendations in the Alexander Report were adopted by the reports of the House and Senate committees reporting the legislation in 1916. (See H.R. Rep. 659; S. Rep. 689, 64th Cong., 1st Sess. (1916))

riers by water or recommend that the Sherman anti-trust law should be enforced against them. . . .

"After giving thorough consideration to this grave question . . . we concluded that many of the provisions of the agreements under which combinations were operating were not objectionable; and hence we recommended reasonable regulation rather than that the combinations might be broken up." (53 Cong. Rec. 8077 (1916))

The congressional assumption that passage of the Shipping Act represented a choice between the antitrust laws and the philosophy favoring conference agreements is reflected in the writing of the early commentators, Johnson and Huebner. They state:

"Having discovered that such relations between ocean carriers are general throughout the greater part of the maritime world, Congress wisely decided that the Sherman Antitrust law should not apply in the future.

* * *

"The act wisely substituted the policy of regulating conference arrangements for the previous policy of prohibition under the federal antitrust laws."
(Johnson & Huebner, *Principles of Ocean Transportation* 385-86 (1919))[36]

The Alexander Committee and Congress believed that application of the antitrust laws to inter-carrier agreements was rejected in favor of regulation of those agreements.

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36. They also state:
"Recent legislation has radically changed the policy of the government concerning the regulation of shipping.

* * *

"Among the features of recent legislation intended to aid shipping are the control of ocean conferences by the Shipping Board, the suspension of the Sherman Act as regards ocean conferences, agreements, understandings and arrangements . . . ." (*Id.* at 426)

Congress did not believe the regulatory approach, which was based on the assumption that agreements between carriers were desirable and should be continued under government supervision, was consistent with the antitrust approach which assumed that the same agreements were inherently evil. There is no mention anywhere in the legislative history of any continuing application of antitrust remedies to matters entrusted by the Act to the regulatory agency.[37] There is no suggestion that conduct violating the Act thereby becomes subject to the antitrust laws.

Had Congress believed that antitrust sanctions and remedies were applicable to unapproved agreements, or that these sanctions and remedies were properly applicable to enforce compliance with the Shipping Act, Congress would hardly have found it necessary to *require* filing of inter-carrier agreements subject to Section 15 and to make failure to file them subject to sanctions and remedies under the Act. Rather, it is reasonable to assume that Congress would have done as it did in the Reed-Bulwinkle Act, 62 Stat. 472 (1948), 49 U.S.C. § 5b (1958), the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246 (1937), 7 U.S.C. § 608b (1958), and the National Industrial Recovery Act, 48 Stat. 195 (1933): make filing of agreements voluntary, but exempt those approved by the administrative body from the antitrust laws. In those situations, it is obvious that unapproved agreements remain subject to the antitrust laws. See, *e.g.*, *United States v. Borden Co.*, 308 U.S. 188 (1939); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

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37. See *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 304 (1963), where the Court examined the legislative history of the Civil Aeronautics Act and gave the following as a reason for concluding that the antitrust laws were displaced: "No mention is made [in the legislative history] of the Department of Justice and its role in the enforcement of the antitrust laws . . . ."

The 1916 Congress carefully studied the entire question of proper public policy toward inter-carrier agreements to fix ocean freight rates. Congress determined that the needs of our foreign commerce and the peculiarities of the ocean transportation industry required a national policy favoring these agreements and that application of the antitrust laws would be harmful for the industry and for our commerce. To guard against abuses, Congress insisted that such agreements receive governmental supervision and that they be tested by stated, non-antitrust criteria. It is wholly consistent with the national policy to require that agreements be filed and approved. It is entirely proper that sanctions are provided to ensure filing and compliance with the standards of the Act. But to judge agreements, particularly agreements that the agency might have approved or has not yet tested under the standards of the Act,[38] by the very antitrust concepts that Congress rejected would be to take an entirely inconsistent approach, to subject the agreements to inapplicable criteria, and to defeat the very policy Congress chose to apply to this industry.[39] Moreover, no purpose would be served by subverting the intention of Congress, for Congress provided remedies and sanctions under the Shipping Act that are wholly adequate to ensure compliance with the Act.

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38. Section 15 does not prevent filing of agreements previously carried out without Commission approval. In the instant case, for example, the Commission's order directed respondents not to carry out supplementary agreements until filed with and approved by the agency.

39. This point is underscored by the instant case. The Commission found that FEC's failure to comply with the terms of an unapproved agreement violated Section 16 of the Act. (Docket 872, 6 SRR at 110)

2. Continuing Policy of Congress That the Shipping Act, Not Antitrust Acts, Regulate Ocean Carrier Agreements

A concise and informative policy statement by the Senate Committee on Commerce in a report accompanying the 1961 revision of the Shipping Act closely parallels the findings and recommendations of the Alexander Report. The Committee stated:

> "Steamship conferences are groups or voluntary associations of ocean common carriers formed so that the members may agree upon rates and certain other competitive practices. Obviously, they do so for the purpose of reducing the rigors of competition which otherwise would exist among the member lines.
>
> "The history of ocean shipping proves beyond peradventure that these competitive rigors are so potentially violent that when unleashed almost invariably they destroy the requisite dependability, regularity and nondiscriminatory nature of ocean common carriage.
>
> "For many years all of the maritime nations of the world, including the United States, have realized that the inevitable monopolistic and discriminatory nature of rate-war competition among the ocean common carriers serving their foreign commerce, justified the formation of conferences so that the carriers may limit or regulate competition between or among themselves. Only the United States imposed over the conference regulatory device a detailed system of Government regulation under the Shipping Act, 1916."
>
> (Senate Comm. on Commerce, Legislative Index, *supra* note 34, S. Doc. No. 100, 87th Cong., 2d Sess. 203 (1962))

Thus, Congress continues to support the objectives of the 1916 legislation, objectives inconsistent with fundamental assumptions of the antitrust laws.

Even more revealing of Congress' continuing policy not to allow the postulates of the antitrust laws to become intermixed with the contrary requirements of the Shipping Act is seen in Congress' rejection in 1961 of Justice Depart-

ment attempts to inject the antitrust laws into Section 15 violations.

As originally drafted, the amendment to the Shipping Act (H.R. 4299, 87th Cong., 1st Sess. (1961)) left the last paragraph of Section 15 providing for penalties for violation of the section unchanged (see Legislative Index, *supra* note 34, at 41, 63). On April 13, 1961, however, draft revision No. 2 was issued (see Legislative Index, *supra* note 34, at 41). It read:

> "*In addition to the penalties provided by the antitrust laws and any other laws,* whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

This wording was identical to that in the draft submitted by the Department of Justice (Hearings Before Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Representatives, on H.R. 4299, 87th Cong., 1st Sess. 453 (1961); hereinafter, "Hearings"). The Justice Department's purpose in attempting to insert this antitrust language was obviously to provide that violations of Section 15 would also be construed to violate the antitrust laws and thereby to resurrect antitrust penalties and remedies that had been inapplicable since 1916. The very fact that this proposal was made indicates an assumption that without such a provision the antitrust laws were not applicable. But even more significant is the fact that the antitrust provision was roundly criticized and immediately deleted by the House Committee on Merchant Marine and Fisheries. It never again appeared in the several subsequent versions of the amended Section 15.

The Chairman of the Federal Maritime Commission had strongly objected to this language, stating to the subcommittee considering the Shipping Act amendments:

"2. Draft revision No. 2 would expressly make the penalties provided by the antitrust laws and 'any other laws' applicable to any violation of sections 2, 3, and 4 of H.R. 4299, in addition to the penalties established by H.R. 4299 itself (p. 10, lines 8-9; p. 13, lines 23-24; p. 15, lines 11-12).

"We believe that the penalties set forth in the act should be self-sufficient and that there should not be superimposed thereon the additional penalties of the antitrust laws and 'any other laws.'

"Under draft revision No. 2 . . . it might be argued that it means that where a violation of this act is also a violation of the antitrust laws or 'any other law,' the penalties of those laws would be applicable. Who is to adjudicate whether there is a violation of the antitrust laws or 'any other law'? Does this mean that any person is free to challenge the legality of a carrier's or other person's acts, under the antitrust laws or under the law of, say, the State of California, by complaining to a court with jurisdiction to administer those laws? We fear that draft revision No. 2 may erect separate and independent, and possibly conflicting, jurisdiction over shipping matters in other forums besides the Board. Or, if it means that the Board will nevertheless have sole jurisdiction over these matters, it appears to require that the Board would have to administer not only the Shipping Act, but also the antitrust laws and any other laws.

"You will recall that section 15 of the Shipping Act, as it now reads, expressly allows for Board approval of price-fixing agreements and other agreements which violate the antitrust laws. *I do not believe that the antitrust laws can be built into the Shipping Act without introducing irreconcilable inconsistencies.* It was no doubt for this reason, that the Shipping Act in its present form carves out exemptions from the antitrust laws, and preempts the field of shipping by placing it exclusively under the Federal jurisdiction erected in the Shipping Act.

"In short, the language of draft revision No. 2 will invite argument that the legality or illegality of acts regulated by the Shipping Act cannot be determined by the standards of that act alone or by the Board alone, and that such acts must be held illegal if they offend against the antitrust laws, or 'any other law' as well. It implies that State and Federal courts, as well as the Board, have independent jurisdiction over matters covered by the Shipping Act. This is at war with the traditional concept of primary jurisdiction of the Federal administrative agencies, a concept reiterated time and again by the Supreme Court. It is the position of the Board that matters falling within the ambit of the Shipping Act and brought thereby under the jurisdiction of the Board should stand or fall under the standards of that act; that violation of those standards should be punishable by penalties specified in that act; and that the administration of that act should be reposed in one Federal administrative board." (Hearings, *supra* page 36, at 459-60.)[40]

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40. Although the Senate debate on the 1961 amendments to the Shipping Act did not specifically concern application of the antitrust laws to agreements in violation of Section 15, it did reject a number of amendments designed to insert certain other antitrust concepts into the bill. (See 107 Cong. Rec. 18235-18247 (September 14, 1961); Legislative Index, *supra* note 34, at 388-423) The most carefully considered statement of the majority view on the place of the antitrust laws in the Shipping Act was made by Senator Schoeppel:

> "Steamship conferences, first, are voluntary associations of companies which operate ocean common carriers. Bluntly stated, they are cartels whose primary purpose is to limit the competition for ocean freight through agreements to control rates, allocate cargoes, and otherwise. It has long been the almost universal practice for American and foreign steamship lines engaging in ocean commerce to operate under such conference agreements and arrangements, and conference agreements are permitted under U.S. law. They were specifically exempted from the antitrust laws in 1916 following a long and comprehensive investigation by the Congress.
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> * * *
>
> "The problem we face today is the basic conflict between our traditional antitrust principles and the cartel concept which guides steamship conferences.
>
> "In resolving this conflict, it is essential to bear in mind that the regulation of international shipping is difficult, if not

Members of the subcommittee, before deleting the antitrust language, made abundantly clear their hostility to application of the antitrust laws in any manner to agreements unapproved under Section 15. For example, Representative Tollefson asked Mr. Stakem, the Chairman of the Federal Maritime Board:

> "MR. TOLLEFSON (reading):
>
> In addition to the penalties provided by the antitrust laws and any other laws, whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.
>
> "I am interested in knowing where this language came from.

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impossible, for any single government to achieve. The foreign commerce of the United States is also the foreign commerce of another nation. At best we could control only one end of the journey, and even then only a minority of the carriers are U.S. citizens or U.S. firms. The testimony of the State Department is compelling in this regard. Furthermore, the history of ocean shipping over the last 100 years shows that there is no happy medium between war and peace, and that rate wars lead to monopoly or to the exposure of American shippers and lines to disastrous competition with foreign shippers and lines. Peace is possible only through the use of conference arrangements and agreements, of which dual rates are often a key element.

"*In the face of these facts, U.S. law for 45 years has exempted steamship conferences from the antitrust laws and substituted instead the restraint of Government regulation specifically designed to take into account of the international character of the industry.* This bill is based on that approach, and it also recognizes that overregulation by the United States will simply result in putting shippers in other areas of the world in a superior competitive position.

"For these reasons, then, I shall support the committee bill. I shall oppose amendments based on our antitrust principles because of the clear showing in our hearings and in the whole history of ocean shipping that they will scuttle the American merchant marine and gravely damage the Nation's foreign commerce." (Legislative Index, *supra* note 34, at 404-405.)

"As Mr. Stakem has said, this makes it possible for the Justice Department to step in, in any case, in a way that it has not been able to do heretofore under the law and under the decisions of the Supreme Court, is that not right?

"Mr. Stakem. I think that is true. We feel very strongly about the inclusion of the antitrust language and the 'any other law' language because I think it waters down the jurisdiction of the Board and does create any number of problems that could be litigated.

"Mr. Tollefson. Well, as you have indicated in your statement, there would be two agencies, if I might call them that. You would have the Department of Justice on the one hand and your Board on the other being able to step into any situation where there was a violation and take action independent of each other, and you might even take different action, is that so?

"Mr. Stakem. That is true." (Hearings, *supra* page 36, at 470.)[41]

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41. Representative Tollefson in the same colloquy exhibited concern over the attitude of and lack of knowledge of international shipping by the Department of Justice:

"Mr. Tollefson. I am very much disturbed by this language principally because of the anti-American merchant marine attitude of the Justice Department.

"The Justice Department, quite apparently and quite evidently from its testimony here the other day, indicates that, first, it has no sympathy with the American merchant marine and, second, it does not understand the problem of international shipping at all.

"I suppose I should put in a third one there, that they do not seem to care to know anything about it.

"I would be worried if this language or these penalty provisions remain in the statute. I am very curious to know how they got in the bill.

"Mr. Stakem. I can only say, Congressman Tollefson, that this language did not come from the Federal Maritime Board and I would like to add to that that we have sincerely tried in consultation with the Justice Department to reconcile the views of Justice with the views of the Board and we were not able to reconcile the views, so that I think both of us come before this committee with a full disclosure of feelings on both

What Congress undertook in 1961 was more than a simple amendment to the Shipping Act. Both the language and the philosophy of the statute were reconsidered in extensive hearings. Rejection by the 1961 Congress of application of the antitrust laws to Section 15 agreements and to other aspects of the Shipping Act is most important. First, because Congress expressed its view that antitrust remedies had never applied to agreements required to be filed under Section 15 of the Act. Second, because Congress rejected the position urged here by Carnation and the Solicitor General. Third, because Congress reaffirmed the regulatory postulates of the Shipping Act elaborated by the Alexander Report in 1914.

An additional strong indication of Congressional intention that antitrust remedies not apply to conduct covered by Section 15 of the Act is seen in a 1964 amendment to the section (78 Stat. 148 (1964), 46 U.S.C.A. § 814 (Supp. 1964)). The Commission had reversed all precedent and determined that leases of marine terminal facilities containing competitive restrictions must be approved under Section 15. The lease in the particular case required that the lessee charge rates "competitive with and not greater than charged at other . . . ports" (S. Rep. No. 770, 88th Cong., 1st Sess. 2 (1963)). This determination affected many terminal leases of a simi-

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sides so that this committee can make an informed judgment as to what the course of action should be.

"Mr. Tollefson. I have just another question or two.

"Do you feel that there would be ample penalty provisions in the bill if the penalty provisions that you have referred to in your statement on page 4 were eliminated from the bill? Would there still remain ample penalty provisions in the legislation?

"Mr. Stakem. Yes, there would, Congressman Tollefson. I think that, if you eliminated the objectionable language, the bill would have ample—and I am looking for a word—sanctions against any company that violated the act." (Hearings, *supra* page 36, at 470-71.)

lar nature that were unfiled and unapproved by the Commission. These agreements, restricting price competition, were thus in a status similar to the "supplemental agreements" here, now determined by the Commission to be unfiled and unapproved. The Department of Justice instituted numerous suits to recover Section 15 penalties for failure to file the lease agreements, even though some of them had by then been approved by the Commission (see *Id.,* at 4-5).

The threat of substantial Section 15 penalties being applied to persons who in good faith had not filed their agreements moved Congress in 1964 to amend Section 15 by enacting what is known in the industry as the Terminal Lease Amnesty Act. Any leases previously executed which were filed for approval within 90 days of enactment of the Act were exempted from Section 15 penalties. Both the Commission and the Department of Justice supported the legislation (*Id.,* at 6, 9).

As the legislative history shows, many of the unfiled, unapproved leases involved agreement on rates, comparable to agreements alleged by Carnation in this case. But no one, not even the Department of Justice, suggested that the lease agreements might be reached under the antitrust laws. No antitrust suits were brought by the Justice Department, before or after the Amnesty Act, on the theory urged here—that unfiled Section 15 agreements give rise to antitrust actions. The obvious intention of Congress, with the concurrence of the Department of Justice, was to relieve the parties to the leases from any penalties. Yet the Amnesty Act made no mention of the antitrust laws for the obvious reason that this was considered unnecessary in view of the Commission's determination that the lease

agreements were subject to Section 15. If Carnation's and the Solicitor General's position as to express exemption were valid, it would have been essential to include an express antitrust exemption in this amendment to accomplish the purpose of relief from all penalties.

Were the position urged by Carnation or that urged by the Solicitor General here correct, it would mean that those who complied with the Amnesty Act by filing leases with the Commission would still be subject to treble damage or other antitrust action. Certainly this was not Congress' intent in extending "amnesty". Surely, too, the 1964 legislation and its history demonstrate again Congress' continuing assumption that agreements required to be filed under Section 15 are subject to the Shipping Act and the Shipping Act alone.

B. CONGRESS, IN THE SHIPPING ACT, 1916, ENACTED A PERVASIVE REGULATORY SCHEME INCONSISTENT WITH TREBLE DAMAGE ANTITRUST ACTIONS

Whether standards of competitive behavior imposed by a regulatory statute displace the antitrust laws and conduct is adjudged in an administrative rather than a judicial forum depends on congressional intention, on the breadth and coverage of the regulatory scheme and on the extent sanctions and remedies are provided for the particular conduct alleged. When a regulatory scheme is comprehensive or "pervasive in nature", it supplants the antitrust laws to the extent it provides its own standards of competitive behavior and penalties and remedies for violation of those standards. Thus, the Civil Aeronautics Act, which is "a regime designed to change the prior competitive system", supersedes the antitrust laws with respect to unfair methods of competition (*United States v. Pan American World Airlines, Inc.*, 371 U.S. 296, 301 (1962)). By contrast absence of a "pervasive regulatory scheme" is often cited by the Court as a

reason for refusing to find supersession (see *California v. Federal Power Comm'n,* 369 U.S. 482, 485 (1962); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 352 (1963); *United States v. Radio Corp. of America,* 358 U.S. 334, 350 (1959)).

That the provisions of the Shipping Act constitute the *most* pervasive of the regulatory acts, that these provisions comprise a self-contained system with full sanctions and remedies for violations thereof is readily apparent from a reading of the statute. The Shipping Act, 1916, even more than legislation affecting aeronautics is, in the words of this Court,

> "a comprehensive measure bearing a relationship to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." (*United States Nav. Co. v. Cunard S.S. Co.,* 284 U.S. 474, 480-81 (1932))

The Supreme Court has also declared that ". . . the Shipping Act embodies a remedial system that is complete and self-contained" (*Terminal Warehouse Co. v. Pennsylvania R.R.,* 297 U.S. 500, 514 (1936)). The Senate Committee on Commerce in recent hearings emphasized that the United States has imposed on its ocean common carriers in foreign commerce "a detailed system of Government regulation under the Shipping Act, 1916" (Legislative Index, *supra* note 34, at 203). The Shipping Act's pervasive regulatory scheme is reviewed in convincing detail in Judge Pope's decision in the court of appeals (R. 169-173). The Solicitor General does not challenge the pervasive nature of the Shipping Act regulatory provisions. Only Carnation raises any question on this point in arguing certain distinctions between foreign and domestic regulation. We believe that, in the face of the consistent view expressed by the courts

and by Congress that the Shipping Act is a fully pervasive regulatory scheme respecting foreign commerce, there is little to be achieved by detailed discussion of Sections 14, 16, 17 and 22 of the Act or by replying to Carnation's contentions in this regard.

1. Shipping Act Grants Full Power Over Unfair Practices to Federal Maritime Commission

Sections 14, 16 and 17 of the Shipping Act deal with unfair competitive practices and discriminatory or prejudicial treatment of shippers, ports and others. These measures, which together comprise a form of Clayton or Federal Trade Commission Act tailored to the maritime industry, are comprehensive both in the extent of their coverage and in terms of the sanctions available in the event the standards are violated (compare 15 U.S.C. §§ 13-15, 45 (1958)). However, the Shipping Act's particular emphasis on equal treatment by carriers, its requirement of nondiscrimination and nonpreferential rates, its abhorrence of rebating and its requirement that reparations be administratively handled to avoid rebates or other inequality of treatment strongly indicate the conflict that would develop if antitrust remedies were applied to the same conduct for which Shipping Act remedies and sanctions exist.

Section 14 prohibits carriers from paying or agreeing to pay deferred rebates, using "fighting ships", and retaliating or threatening retaliation against shippers who patronize other carriers or file complaints. It also outlaws discriminatory volume contracts and prohibits unfair treatment or unjust discrimination against shippers respecting cargo space and claims.

The essence of the detailed regulation provided in Sections 16 and 17 is to require carriers to extend nonpreferential and nondiscriminatory treatment to their customers

and to the localities they serve. Among other restrictions the carriers are prohibited from providing transportation at less than regular rates or otherwise rebating and are required to provide uniform treatment in handling cargo to and from the ship. A principal effect of these sections is to require carriers to apply their rates uniformly, so that no shippers obtain advantages over other shippers. This policy, reinforced by the requirement in Section 22 that the Commission administer reparations and that penalties for violations of the Act be recovered by the United States rather than the injured party, gives the Commission the role of enforcing equality of treatment by carriers. This role, which is in direct conflict with treble damage recoveries by particular shippers, is emphasized also by the requirement of Section 14 that adjustment and settlement of shipper claims not be discriminatory or unfair.

Complaint Raises Section 16 Issues

Carnation's complaint charged that Carnation was injured by PWC's failure to take independent action on Carnation's rate request, and by the fact that respondents failed to place Carnation's product on the initiative list (R. 19-20). The Commission has now concluded that PWC and FEC violated Section 16 of the Act. PWC violated Section 16 by unreasonably failing to take independent action on Carnation's rate request as it had the right to do under its agreement with FEC. FEC in turn violated Section 16 by failing "to implement fully the terms of the [unfiled] supplemental agreements. . . ." and to concur in placement of Carnation's product on the initiative list (Docket 872, 6 SRR 110). Carnation could have sought reparations which the Commission was obviously willing to grant (*Ibid.* n. 4). The Conferences still face criminal penalties under Section 16.

Under *Keogh v. Chicago & N.W. Ry.* and *Terminal Warehouse Co. v. Pennsylvania R.R., supra,* as well as under the *Cunard* decision, the antitrust complaint must be dismissed, since it raises questions of unreasonable discriminatory treatment reserved for the Commission's decision under Section 16. Thus, in *Cunard,* the Court, in dismissing the complaint, pointed out that the allegations of the complaint

> "... either constitute direct and basic charges of violations of these provisions [Sections 14, 15, 16 and 17] or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws." (284 U.S. at 485)[42]

There is no contention here that allegations raising violations of Section 16 are not exclusively for the Commission's determination.

The above cases point out that statutes regulating the transportation industry stress uniform treatment of shippers, ports and products. It is particularly anomalous, therefore, to give a treble damage remedy to a shipper who is subjected to "prejudice" or "disadvantage" even if the treble damage complaint does not on its face state the prejudice with specificity. The theory of reparations, carefully supervised by one agency, is that the prejudice or discrimination is erased and the shipper restored to competitive equality vis-a-vis other shippers. Penalties, therefore, are paid to the

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42. In *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350 (1963), the Court pointed out that unlike the Comptroller of the Currency, the CAB,

> "... had been given broad powers to enforce the *competitive standard clearly delineated by* the Civil Aeronautics Act [so that] ... the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers ...."

(See also *United States v. Radio Corp. of America,* 358 U.S. 334, 339 (1959))

United States, not the shippers. Treble damages, on the other hand, destroy uniformity of treatment of shippers and jury awards will vary in each case. As stated in *Cunard:*

> "[I]f a shipper were permitted to recover under the Antitrust Act, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. 'Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.'" (284 U.S. at 483; see *Texas & Pac. Ry. v. Abilene Cotton Oil Co.,* 204 U.S. 426 (1907))

2. Section 15 Vests Full Authority Over Agreements Limiting Competition or Fixing Ocean Rates in Federal Maritime Commission

Section 15 of the Shipping Act embodies the central core of that part of the Act that creates "a regime designed to change the prior competitive system." (*Pan American World Airways, Inc. v. United States, supra,* 371 U.S. at 301)[43] Section 15 is directly concerned with a matter that is at the heart of antitrust doctrine: inter-competitor agreement on prices. Section 15 requires carriers and other persons to file with the Commission copies of all agreements, conferences or understandings with other carriers or other persons "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special

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43. "With respect to ocean transportation, however, Congress from the beginning chose to exempt agreements among carriers and between carriers and shippers from the antitrust laws. They thus rejected court determined competition and preferred to rely upon regulation under an expert administrative agency." (*Federal Maritime Bd. v. Isbrandtsen Co.,* 356 U.S. 481, 513 (1958), Frankfurter, J., dissenting on another ground; see majority opinion to same effect at 489-91.)

"It thus seems evident that Congress has set up a standard for the shipping business quite different from that applicable to trade agreements affecting business on land." (*United States Nav. Co. v. Cunard S.S. Co.,* 50 F.2d 83, 88 (2d Cir. 1931), *aff'd,* 284 U.S. 474 (1932)).

privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential or cooperative working arrangement." (46 U.S.C. § 814 (1958)) Agreements approved by the Commission are specifically excepted from the antitrust laws.

That filing of Section 15 agreements is required rather than permissive indicates that carrying out unfiled agreements is a Shipping Act, not an antitrust question. The counterpart of Section 15 in the Interstate Commerce Act provides merely that carriers "may . . . apply to the Commission for approval of the agreement. . . ." (49 U.S.C. § 5b (1958)) Unlike the Shipping Act, there are no penalties for failure to file, and no basis exists for reparations to injured parties. Agreements approved are exempted from the antitrust laws, but, consistent with the voluntary nature of section 5b, the legislative history shows that the antitrust laws continue to apply to unapproved agreements (see 1948 *U.S. Code Cong. & Ad. News*, 1844, 1848). There is, of course, no such indication with respect to the Shipping Act.

Another indication that the antitrust laws do not apply to unfiled Section 15 agreements or agreements beyond the scope of a filed agreement is that Section 15 states that the Commission "shall approve" all agreements that it does not find to fall into specific prohibited categories. The Shipping Act alone provides the standard by which such agreements may be disapproved: *i.e.,* those that are "unjustly discriminatory or unfair" or those that "operate to the detriment of the commerce of the United States" or those that violate other provisions of the Act (46 U.S.C. § 814 (1958)).

The language of the section favoring approval of these agreements limiting price competition and contemplating approval of agreements previously unfiled with the Commission suggests that Congress did not intend these agreements to be subject to antitrust attack on the grounds that they are unfiled. The statute in effect recognizes the problem (discussed *infra*) of the great difficulty of knowing whether or not an approved agreement includes subsequent action taken by the parties to implement the agreement. Section 15 resolves that problem by providing that if carriers—or the Commission by informal advice—guess wrong, an agreement that should have been filed but was not may still meet the statutory criteria and be approved. The Commission will consider the merits of unfiled agreements in a future proceeding. It should have the opportunity to do so. The supplementary agreements carrying out approved Agreement 8200 may well be the inherently desirable type of agreement that the Commission is directed to approve. These agreements should not be subjected in the interim to a crushing antitrust assault.

As stated in the *Pan American* case, "it would be strange, indeed," if actions "which met the requirements of the" regulatory statute "were held to be antitrust violations" (371 U.S. at 309). "It would also be odd to conclude that" a matter that could pass muster before the administrative body "should run afoul of the antitrust laws." (*Ibid.*) The Court continued:

> "Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review . . . ." (*Ibid.; see United States v. Radio Corp. of America, supra,* 358 U.S. at 347 n. 16.)

The circumstances of the instant case suggest an additional and serious danger inherent in failing to dismiss antitrust complaints alleging injury from rates set pursuant to unfiled Section 15-type agreements. The difficulty in knowing what agreements need be filed and what sub-agreements are included within the scope of approved agreements strongly suggests the wisdom of allowing the administrative agency with its expertise to handle such questions within the administrative framework. Not all agreements literally falling within the terms of Section 15 need be filed with the Commission. Indeed, the Commission refuses to accept for filing "routine arrangements for carrying out authorized agreements" though these "may be received as information." (46 C.F.R. § 522.6; see Section 15 Inquiry, 1 U.S.S.B. 121 (1927))

The difficulty of determining which agreements need be approved by the agency and which are "routine" is further indicated by the Commission's proposed rule-making in its Docket No. 876 (see 25 Fed. Reg. 359 (Jan. 15, 1960)):

> "The term 'agreement' does not include routine, day by day activities under the plan or program which is provided for under the express language or reasonably intendment of such language of a previously approved section 15 agreement: such as (but not limited to) the adoption of tariffs of rates . . . and rules and regulations pertaining thereto . . . adopted by the parties pursuant to an approved section 15 agreement."

This proposed rule has never become final, doubtless because it only promotes confusion. The Commission has preferred to treat Section 15 filing questions on a case-by-case basis.

Every conference agreement is in one way or another an agreement to agree further. It is evident that if the courts are to entertain antitrust actions alleging unfiled agree-

ments, it is always possible for the plaintiff to allege an agreement that exceeds the scope of the approved agreement, thereby injecting the courts into questions that are for the Commission to determine.

The decisions of the Commission have demonstrated the quandary in which parties to agreements find themselves when the Commission makes new standards in a specific case applicable retroactively to others similarly situated. *Agreements Nos. 8225 and 8225-1 Between Greater Baton Rouge Port Commission and Cargill, Inc.,* 5 F.M.C. 648 (1959),[44] which for the first time encompassed terminal leases within the ambit of Section 15, is a classic example. Docket 872, here, is another example. In finding that "supplemental" agreements (which had been filed for information) were beyond the scope of Agreement 8200, the Commission said: *"Although not articulated in past cases, we are of the opinion that the applicable test here* is whether or not the Agreement as filed with the Commission and as approved sets out in adequate detail the procedures and arrangements under which the concerted activity permitted by the agreement is to take place" (6 SRR at 105).

With such constantly changing ground rules the proposal of the Solicitor General to subject parties to the antitrust laws when the Commission determines the agreement should previously have been filed, is fundamentally unfair. This is the very type of situation which Congress believes may well merit only minimum penalties (see note 33, *supra*).

Many other practical problems arise if the settled doctrine of the *Cunard* case that, "the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws" is jettisoned (*United States Nav. Co. v.*

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44. *Aff'd,* 287 F.2d 86 (5th Cir. 1961), *cert. denied,* 368 U.S. 985 (1962).

Cunard S.S. Co., supra, 284 U.S. at 485). The practical problems arising in the absence of this doctrine include:

The Double Recovery Problem

Assume Carnation had sought reparations from the Maritime Commission as well as treble damages in the courts, and the Commission determined that there *were* violations of the Shipping Act and awarded reparations. Would Carnation be barred from further recovery on its antitrust theory or would respondents be subject not only to conflicting statutory schemes but double recoveries as well? The same problem exists if the Court grants treble damages and the Commission is then asked for reparations. And does not the same problem exist with respect to the cumulative penalties under both statutes?

The Res Judicata Problem

Under Carnation's theory, which assumes that a plaintiff can begin an action before a court, the agency, or both, it is unclear whether the decision of the first forum to reach the finish line must be accepted by the second forum, be it court or agency. Each forum may well have its own view of the facts, the policy applicable thereto, the culpability, if any, of defendants, and whether to grant a remedy. The *Cunard-Far East* rule avoids this problem.

The Sound Administration of Justice Problem

Assume, as here, plaintiff sought recovery only before the court. If the question whether an agreement alleged had been approved by the Commission and specifically exempted by the antitrust laws were referred to the Commission for decision, as suggested by the Solicitor General, is it sound policy or intelligent administration of justice to bring the Commission into the case to resolve this important substantive issue under Shipping Act standards but

then have the courts apply penalties and damages pursuant to entirely different legislation founded on wholly inconsistent basic economic assumptions?

Choice of Remedies Problem

Assume that both Shipping Act *and* antitrust remedies are available to plaintiff, but plaintiff must elect between them. Should it be the choice of a private litigant whether the reparations procedure of the Shipping Act or the treble damages provided by the antitrust laws are applied to particular conduct? Is not Congress' provision for sanctions under the Shipping Act an indication that these measures are to be used?

Given the difficulty of determining what agreements need be approved by the Commission and the ease of alleging that a given agreement was not approved, it seems infinitely more consistent with Congress' policy in enacting the Shipping Act that the entire question, including violation of the Act and the consequences thereof, be handled under the Shipping Act.[45]

3. Federal Maritime Commission Has Full Power Over Violations of Shipping Act, Subject to Judicial Review

None of the administrative schemes is so all-inclusive with respect to the remedies and sanctions for violation of the regulatory standards as the Shipping Act.

Unlike the Interstate Commerce Act, the Motor Carriers Act and statutes regulating aviation, which expressly "save" other remedies,[46] the Shipping Act contains no sav-

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45. This is particularly so since the Commission may in a given case determine to give its stamp of approval to the agreement or may, as here, defer approval for a subsequent proceeding.

46. See Interstate Commerce Act, Part I, §§ 9, 22, 49 U.S.C. §§ 9, 22 (1958); Interstate Commerce Act, Part II, § 216 (j), 49 U.S.C. § 316(j) (1958); Federal Aviation Act § 1106, 49 U.S.C. § 1506 (1958); *T.I.M.E. Inc. v. United States,* 359 U.S. 464 (1959); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.,* 204 U.S. 426 (1907).

ing clauses; its remedies and sanctions were intended to be complete and exclusive. Unlike the Interstate Commerce Act,[47] the filing of rate-making agreements such as those alleged by Carnation herein is mandatory rather than voluntary, and failure to file subjects participants to a heavy penalty. Violators of Section 15 or of other sections of the Act are subject to administrative cease and desist orders. The Commission may also award reparations to parties injured by violations.[48] Importantly, all final orders of the Maritime Commission are subject to judicial review.[49] By contrast, reparations are never available to injured parties before the Civil Aeronautics Board,[50] and deter-

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47. See Interstate Commerce Act, Part I, § 5b, 49 U.S.C. § 5b (1958).

48. Shipping Act, Section 22. Violation of Section 15 by reason of the carrying out of an unfiled and unapproved Section 15-type agreement gives an injured party a right to reparations under Section 22 to the extent that he can prove damages. See *American Union Transp., Inc. v. River Plate & Brazil Conferences*, 5 F.M.B. 216 (1957), *aff'd sub nom. American Union Transp. v. United States*, 257 F.2d 607 (D.C. Cir.), *cert. denied*, 358 U.S. 828 (1958); *Swift & Co. v. Gulf & So. Atl. Havana Conference*, 6 F.M.B. 215 (1961), *rev'd sub nom. Swift & Co. v. Federal Maritime Comm'n*, 306 F.2d 277 (D.C. Cir. 1962), see 7 F.M.C. 431 (1962) (settlement agreement on reparations); *Kempner v. Federal Maritime Comm'n*, 313 F.2d 586 (D.C. Cir. 1963). If the Commission orders reparations, the order may be enforced in a district court and attorneys' fees and costs recovered (Shipping Act, 1916, § 30, 39 Stat. 737 (1916), as amended, 46 U.S.C. § 829 (1958)).

49. Review Act of 1950, 64 Stat. 1129 (1950), as amended, 5 U.S.C. §§ 1031-1042 (1958). These orders include, of course, orders denying reparations, *American Union Transp., Inc. v. United States*, 257 F. 2d 607 (D.C. Cir.), *cert. denied*, 358 U.S. 828 (1958).

50. See *S.S.W., Inc. v. Air Transp. Ass'n of America*, 191 F. 2d 658 (D.C. Cir. 1951), in which the court states at pages 663 and 664:

> "The prayer for treble damages under the antitrust laws raises a different problem. The Civil Aeronautics Act, *unlike* the Interstate Commerce Act and the *Shipping Act*, does not authorize the award of damages by the Board for violation

minations of a stock exchange or orders approving mergers entered by the Comptroller of the Currency are not subject to judicial review (see *Silver v. New York Stock Exchange,* 373 U.S. 341, 358 n. 12 (1963); *United States v. Philadelphia Nat'l Bank, supra,* 374 U.S. at 351). Of all the cases that concern accommodation of regulatory schemes with the antitrust laws, none, save those discussing the exclusive jurisdiction of the Maritime Commission, involves so complete and adequate a grouping of sanctions and remedies as available under the Shipping Act.

Of even greater importance, as the Commission's decision in Docket 872 shows, this panoply of sanctions and remedies was all available to Carnation with respect to the matters alleged in the antitrust complaint. Carnation could have sought reparations for injuries suffered as a result of violations of Sections 15 *and* 16 of the Act[51]; a cease and

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of its provisions. *Where specific damage provisions are contained in regulatory statutes, it has been held that there may be no recovery of treble damages under the antitrust laws."* (citing *Terminal Warehouse, Cunard* and *Keogh*)

51. Carnation argues that if the Shipping Act remedy is held exclusive it would deny the right to a jury trial provided in the Seventh Amendment of the United States Constitution (Pet. Br., 56-59). This overlooks the basic guarantee of the Seventh Amendment: a jury trial for "Suits at common law" (U.S. Const. amend. VII). The Seventh Amendment does not guarantee jury trial for a recovery of money damages resulting from a statutory violation unknown at common law (*NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937); see also Note, Application of Constitutional Guarantees of Jury Trial to the Administrative Process, 56 Harv. L. Rev. 282 (1942); 1 Davis, *Administrative Law Treatise,* § 8.16). A civil suit for damages resulting from a conspiracy in restraint of trade was not known at common law (*U.S. v. Addyston Pipe & Steel Co.,* 85 F. 271 (6th Cir. 1898), *modified and aff'd,* 175 U.S. 211 (1899)). Carnation's contention was settled as long ago as 1907 in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.,* 204 U.S. 426 (1907), and in *Keogh v. Chicago & N.W. Ry.,* 260 U.S. 156 (1922). Carnation says under the Interstate Commerce Act the issue does not arise because of the saving of remedies. However, in both *Abilene* and *Keogh* the plaintiff elected to sue in the courts but reparations awarded by the agency were held to be the exclusive remedy.

desist order was entered by the Commission against the carrying out of the supplementary agreements to Agreement 8200; finally, the finding of violation of two sections of the Act makes respondents subject to suits for $1,000 per day penalties which the United States may recover in a civil action, and to a fine of $5,000 for each violation of Section 16.

The fact that Congress provided complete and adequate remedies is in itself ground for concluding that there was no intention that litigants might proceed under the antitrust laws if they so preferred. As Judge Augustus Hand stated in the *Cunard* case when it was before the Second Circuit Court of Appeals:

> "It is difficult to suppose that Congress ever intended to give private parties two sets of remedies, under each of which reparation as well as other relief might be had, and still harder to imagine that these remedies might be pursued pari passu."

(*United States Nav. Co. v. Cunard S.S. Co.*, 50 F. 2d 83, 90 (2d Cir. 1931), *aff'd*, 284 U.S. 474 (1932))[52]

Although the full remedies and penalties of the Shipping Act alone are sufficient to demonstrate that Congress intended the sanctions and remedies above to be exclusive, strong policy considerations also point to the same conclusion. The nature of these considerations is well described in the pioneer case, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), in which a simple interpretation

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52. This Court has also found the assumption unreasonable that Congress, in providing remedies under a regulatory scheme, intended also to preserve treble damage antitrust remedies. In *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 162 (1922), Mr. Justice Brandeis asked:

> "Can it be that Congress intended to provide the shipper from whom illegal rates have been exacted with an additional remedy under the Anti-trust Act?"

of the statute would have led to the conclusion that the remedies and forum provided by the regulatory statute were *not* exclusive.

Abilene, a shipper, brought a common law action in a state court alleging overcharges by the railroad. Sections 9 and 22 of the Interstate Commerce Act stated that shippers had the alternative of bringing actions in courts or before the ICC, and expressly preserved common law causes of action. But this Court found that an overriding need for uniformity of interpretation of the Act and the danger of rebates and preferences inherent in the dual remedies scheme required the conclusion that the ICC "alone is vested with power originally to entertain" such proceedings (*Id.* at 448). The purpose of the Interstate Commerce Act (like the Shipping Act) was elimination of discrimination and prejudice and establishment of rates "which should have a uniform application to all" (*Id.* at 439). Allowance of court suits would mean that different courts would reach different conclusions, destroying uniformity of interpretation and virtually assuring that similarly situated shippers would receive different treatment (*Id.* at 440). Recognition of the right to bring suit in court would be

> "wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed." (*Id.* at 441)

The Court pointed out that "no reason can be perceived" for the existence of sanctions and remedies in the regulatory statute and also before the courts *(Ibid.)*. Conceding that the wording of the statute appeared to allow dual

remedies, the Court answered: "the act cannot be held to destroy itself." (*Id.* at 446)

These same considerations are equally applicable to antitrust treble damage actions that allege violations of the Shipping Act, a statute that does not contemplate dual remedies. Carnation is complaining of a rate that it alleges is illegal, and it seeks treble damages therefor. If it should succeed in this endeavor, Carnation would receive a preference over its competitors comparable to a rebate in violation of the many injunctions in the Shipping Act against preferences and against the obtaining of transportation for less than tariff rates. It was to avoid such preferences that the Shipping Act provided for administrative orders of reparations and for financial penalties to be paid to the Government. That the framers of the Act considered court actions and settlements with carriers a danger to the published rate structures is indicated by the prohibition in Section 14, Fourth, of discrimination in "the adjustment and settlement of claims" and in Section 16, Second, of allowing any person "to obtain transportation . . . at less than the regular rates . . . by any . . . unjust . . . device or means." (46 U.S.C. §§ 812, 815 (1958))

It is no answer, as the *Keogh* case makes clear in discussing treble damage actions and the Interstate Commerce Act,

> "to say that each [person injured] . . . might bring a similar action . . . . Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief." (*Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922))

As the court of appeals noted: if actions such as Carnation's were allowed it would

"produce for the shipping industry confusion worse confounded, destroy uniformity of interpretation and enforcement of the Shipping Act, and bring about the very type of discrimination which that Act was designed to avoid." (R. 177)

In the endeavor to protect Carnation from the consequences of not timely filing for reparations under the Shipping Act, the Solicitor General has omitted any reference to the awesome penalties to which under his theory the carriers would be subject. However, under the theory espoused the ocean carriers unlike any other industry would be exposed to all the penalties of the regulatory statute and, in addition, all the penalties that apply to unregulated industries:

(1) Fines up to $50,000 or imprisonment up to one year, or both. Sherman Act, § 1 (15 U.S.C. § 1 (1958)).

(2) Treble damages, costs and attorneys' fees (extracted as punishment, Pet. Br. p. 29). Clayton Act, § 4 (15 U.S.C. § 15 (1962)).

(3) Penalties of $1,000 *per day*. Shipping Act, § 15 (46 U.S.C. § 814 (1958)).

(4) $5,000 *"for each offense"* under the Shipping Act, § 16 (46 U.S.C. § 815 (1958)).

Surely Congress never conceived of such a result!

The membership of steamship conferences is international. The foreign commerce of the United States is at the same time the foreign commerce of another nation. Should such massive penalties be applied to conferences and their foreign carrier members there is a danger of retaliatory action by foreign governments that might threaten our foreign commerce and jeopardize our relations with other states (see Legislative Index, *supra* note 34, at 404-05). Unilateral U.S. shipping regulation itself involves

delicate international problems. That is why this Court in the *Pan-American* case (371 U.S. at 310) and the court of appeals below (R. 179) pointed out that foreign policy considerations support the conclusion that Congress did not intend to subject international carriers to treble damage remedies.

III. Dismissal Was the Proper Course

The Solicitor General, speaking for the Commission and not as amicus curiae, is in a strange position to be complaining here that dismissal was improper. Dismissal was the result ardently sought by the Commission before the courts below.[53] The Solicitor, on the Commission's behalf, now rejects the very result the Commission was so successful in obtaining. The rule that a party cannot urge reversal of the very result it requested below (*e.g., Orenstein v. United States,* 191 F.2d 184, 193 (1st Cir. 1951)) is not made inapplicable if that party (here the Commission) changes lawyers.

Moreover, it is well settled that a party that has not taken an appeal or petitioned this Court for certiorari cannot question the correctness of the decree of the trial court (*Alaska Industrial Bd. v. Chugach Electric Ass'n.,* 356 U.S. 320, 325 (1958); *Mechanics Universal Joint Co. v. Culhane,* 299 U.S. 51, 58 (1936); *Federal Trade Comm'n v. Pacific States Paper Trade Ass'n.,* 273 U.S. 52, 66 (1927); *United States v. Blackfeather,* 155 U.S. 218, 221 (1894)). Contrary

53. The Commission intervened as a defendant to move for dismissal of the complaint "on the ground that the Shipping Act, 1916 . . . provides the exclusive remedy for the wrongs alleged in the complaint . . . ." (R. 34-35) The Commission also informed the district court that "defendant intervener's sole purpose in participating in this proceeding is to move the court to dismiss the complaint . . . ." (R. 36) The position consistently urged by the Commission before the courts below coincided with that urged by PWC and FEC (R. 96-98; see Notes 2 and 4, Supplemental Brief in Opposition for Respondent Pacific Westbound Conference, replying to petition for writ of certiorari).

to this rule, the Solicitor, representing the Commission, here urges reversal.

Under Carnation's theory, stay as opposed to dismissal of the antitrust suit is not a possibility. If the *Cunard* doctrine is applicable, antitrust remedies are unavailable. Carnation, accordingly, urges that *Cunard* does not apply and that the court should have proceeded with the antitrust suit without awaiting Commission action (Pet. Br., pp. 20, 29). Accordingly, Carnation never presented the "stay" question below[54] and may not properly argue it here. We have heretofore shown the reasons why *Cunard* and similar cases do apply to this case.

But implicit in the Solicitor General's theory for resolution of this case is the assumption that when the case was before the district court that court should have stayed this action until the Commission decided Docket 872 (S.G. Br., pp. 29-30). Thereafter, according to this theory, a treble damage remedy exists if agreements alleged are held by the Commission to have been unapproved. (Since, however, the Commission has decided Docket 872, a stay, under the Solicitor's view, is not now necessary.) We point out above that the Solicitor General's theory is wrongly conceived and contrary to the rulings in *Cunard, Far East, Pan-American, Terminal Warehouse* and *Keogh*. We wish to point out here that in no case cited by the Solicitor was stay decreed. Rather, as this Court recently concluded in *Pan-American*, "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course" (citing *Cunard* and *Far East*) (371 U.S. at 313 n. 19).

54. Petitioner for the first time now raises as a contingent question: "7. In any event was it not error to dismiss rather than to hold waiting agency action if any such action was required?" (Pet. Br., p. 8)

The Solicitor's theory in effect rejects the determination, clearly articulated in this Court's decisions and confirmed with respect to the Shipping Act by the 1961 legislation, that administrative remedies supersede antitrust remedies. Under the guise of asking the Court to limit *Cunard, Far East* and *Pan-American,* the Solicitor General in effect asks this Court to reverse well-settled and highly sensible doctrine on which those cases were based.

That the district court was correct in dismissing the complaint is emphasized by the Commission's recent decision in Docket 872. In that decision the Commission embraced all the questions raised by the complaint as Shipping Act questions. Therefore, it is doubly clear that there remain no antitrust questions without the purview of the Shipping Act for the district court to decide. If Carnation had alleged (or the Commission found) conduct by respondents, such as a merger, violative of the antitrust laws, there might remain antitrust questions for the Court "other than those enumerated in the Act", a situation contemplated in *Pan American* (371 U.S. at 305).

Further proof that dismissal was proper is seen in the fact that the Commission found that approved Agreement 8200 authorizes the parties to "agree to establish" ocean rates (6 SRR at 102), that contrary to Carnation's central allegation (R. 20), there was no secret agreement by which PWC gave up the right to take independent rate action granted in approved Agreement 8200 (6 SRR at 108 and 112); that an agreement respecting concurrence procedures for placing items on the initiative list violated Section 15 (6 SRR at 112); and failure of PWC to take independent action violated Section 16's prohibition of undue prejudice and disadvantage (6 SRR at 112). The Commission's decision leaves nothing for the court to decide.

Finally, the fact that the Commission found the very conduct complained of to raise questions subject to Section 16 of the Act, which section in the Commission's view required FEC to comply with the terms of the unfiled agreement respecting concurrence on items to be placed on the initiative list (6 SRR at 110), shows that this case cannot be viewed as a Section 15 problem alone. The allegations raise problems that are thoroughly intermixed with a variety of other Shipping Act policies, prohibitions, and requirements. Dismissal was proper because all these questions, including the interrelationship between Section 15 and Section 16, are matters for the Commission to decide, subject to judicial review.

As stated in the Memorandum filed by the Solicitor General with this Court in December, 1964, at page 4:

> "The questions involved in this case are whether the alleged secret agreement between Pacific and Far East 'was made in fact; whether, if made, it was contrary to Agreement No. 8200; and finally, whether it would be required to be filed by the Commission' (Pet. App. 31)."

The Commission has determined that the secret agreement alleged did not exist. That ends any contention that antitrust remedies might be applicable.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

San Francisco, California
October 16, 1965

Respectfully submitted,

Edward D. Ransom
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Attorneys for Respondent Pacific Westbound Conference, and its member lines.

CERTIFICATE OF SERVICE

I, Edward D. Ransom, certify as follows:

I am a member of the Bar of the Supreme Court of the United States. I represent respondent Pacific Westbound Conference in the above entitled matter, in whose behalf service of the foregoing Brief has been effected as herein stated.

I certify that on or before October 17, 1965, I served the foregoing Brief of respondent Pacific Westbound Conference by service of three (3) copies upon the attorneys for petitioner, three (3) copies upon the Solicitor General of the United States, three (3) copies upon attorneys for the Federal Maritime Commission, and three (3) copies upon

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 20

CARNATION COMPANY,

Petitioner,

v.

PACIFIC WESTBOUND CONFERENCE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS FAR EAST CONFERENCE, ET AL.

The Question Presented

Since we do not agree that the narrow issue in this case is brought into proper focus by petitioner's lengthy statement of questions, we would restate the question presented as follows:

Was the complaint herein, which seeks antitrust damages for enhancement of ocean freight rates through unlawful concerted action of ocean common carriers, properly dismissed below on the ground that the complete program of the Ship-

ping Act, 1916, for the substantive (§15) and remedial (§22) regulation of ocean carrier agreements superseded, *pro tanto*, the antitrust laws, and exclusive jurisdiction of claims for violation of the Shipping Act resides in the Federal Maritime Commission?

Statement of the Case

We do not quarrel with the Government's statement of the case except insofar as it includes a paraphrase of §15 of the Shipping Act which assumes the conclusion which the Government urges upon this Court (Brief, p. 5). However, there are two points which petitioner makes with respect to the facts which deserve comment.

Petitioner (Brief, pp. 9-10) emphasizes that respondents "have elected to proceed without creating issues of fact". This, of course, is always true when a defendant moves to dismiss a complaint on the ground that it fails to state a claim upon which relief may be granted. The sufficiency of the complaint can only be tested by assuming, for the purposes of the motion to dismiss, that the facts well pleaded in the complaint are true. If the granting of the motion to dismiss is upheld, no further pleading by the defendants will be required. If, on the other hand, the decision below should be reversed, the defendants will, under Rule 12(a) of the Federal Rules of Civil Procedure, have their opportunity to make appropriate denials of matters alleged in the complaint and to assert affirmative defenses.

More important is the matter of the nature of the claim made in the complaint. Petitioner does state (Brief, p. 6): "The gist of the complaint is that by an unapproved agreement the defendants increased the rate for carriage by water from the Pacific Coast to Manila by $2.50 per ton, and plaintiff [petitioner], a shipper of evaporated milk, was forced to pay this increase." That this is the gravamen of the complaint we heartily agree, and a fair reading of the complaint—particularly paragraphs 18, 21, 22, 24, 25, 26, 28, 29 and 30 thereof (R. 19-25)—can lead to no other conclusion. However, at various points (*e.g.*, Brief, pp. 74 and 92) petitioner seeks to characterize the proceeding as a simple overcharge case. This it does in an effort to obtain excessive benefits from the holding in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922)—a case which involved no question regarding the antitrust laws or their relationship to a regulatory statute. It should be readily apparent that petitioner would have no basis for proceeding under the antitrust laws if it were merely seeking to recover the difference between the tariff rate and some excess over the tariff rate. It is only by claiming that the tariff rate itself was unduly enhanced by unlawful concerted action that petitioner can lend even the color of antitrust violation to its claim.

No matter how petitioner may struggle to free itself from the confines of its own complaint, it must inevitably return to the simple issue put forward in our statement of "The Question Presented."

The abrupt reversal of the "Government" position in this case following the decision of the Court of

Appeals is worthy of note on account of its implications in the event that the *rationale* of the decision below should not be upheld. In the District Court, the Commission[1] intervened "for the purpose of moving this [the District] Court to dismiss the complaint herein" (R. 33). The Commission's motion was placed "on the ground that the Shipping Act * * * provides the exclusive remedy for the wrongs alleged in the complaint and therefore this honorable Court is without jurisdiction in this matter." (R. 34-35). The Commission, as an appellee, also argued to the United States Court of Appeals for the Ninth Circuit that the complaint should be dismissed.

Thus, until the case arrived at this Court, the Commission followed a consistent course dating back at least to *Far East Conference* v. *United States, infra.*

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1 The United States Shipping Board was the agency which was established by § 3 of the Shipping Act, 39 Stat. 729, and which was charged with the administration of that Act. Subsequently, by Executive Order No. 6166, June 10, 1933, § 12 (set out in note under 5 U. S. C. A. § 132), the United States Shipping Board was abolished and its functions were transferred to the Department of Commerce. Thereafter, by the Merchant Marine Act, 1936, 49 Stat. 1985, the United States Maritime Commission was created and the functions of administering the Shipping Act were transferred to it. The functions of the United States Maritime Commission were transferred to the Federal Maritime Board, pursuant to the provisions of the Reorganization Act of 1949, 63 Stat. 203-207, 5 U. S. C. §§ 133(z) to 133(z)-15, and Reorganization Plan No. 21 of 1950, 15 F. R. 3178, 5 U. S. C. A. following § 133(z)-15. Finally, by Part I of Reorganization Plan No. 7 of 1961, 26 F. R. 7315, 75 Stat. 840, effective Aug. 12, 1961, as amended by Pub. L. 88-426, Title III, § 305(19) (Aug. 14, 1964), 78 Stat. 425, the Federal Maritime Commission was created and to it were assigned the regulatory functions under the Shipping Act, 1916, as amended. See note following 46 U. S. C. A. § 1111, 1965 pocket supplement. Whenever herein it will serve to avoid confusion, we refer to the Commission and its predecessors as "the Commission."

There, in the District Court, the Commission intervened in order to urge dismissal of the Attorney General's antitrust complaint on the grounds of supersession of the antitrust laws and exclusivity of the administrative remedy under the Shipping Act. *United States* v. *Far East Conference,* 94 F. Supp. 900, 902 (D.N.J. 1951). When this Court granted a writ of certiorari to review the District Court's denial of the motion to dismiss, the Commission argued, with the aid of special counsel, that the District Court's order should be reversed and the complaint should be dismissed. *Far East Conference* v. *United States,* 342 U.S. 811 (1951) and 342 U.S. 570, 571, 572 (1952).

During the three years of Congressional activity touched off by *Federal Maritime Board* v. *Isbrandtsen,* 356 U.S. 481 (1958), the Commission on at least two occasions asserted to committees of the Congress the exclusivity of its jurisdiction over agreements of common carriers by water in the foreign commerce of the United States. In the course of the investigation conducted by the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, in 1959, Commission representatives were questioned on the matter of supersession and were invited to submit a memorandum of their legal position.[2] The memorandum, over the signature of the Commission's General Counsel at that time, E. Robert Seaver, Esq., was printed in the transcript of the Hearings.[3] The memorandum shows only staunch and well-reasoned

[2] "Monopoly Problems in Regulated Industries." *Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary, House of Representatives,* 86th Cong., 1st Sess. (1959), Part 1, Vol. I, Serial No. 14, pp. 68-70, 77, 904.

[3] *Id.*, pp. 926-938.

adherence to the position taken by the Commission and vindicated in *Far East Conference*.

Again, after draft legislation before the Committee on Merchant Marine and Fisheries of the House of Representatives proposed to subject ocean carriers to the penalties not only of the Shipping Act, but also of the antitrust laws,[4] the Chairman of the Commission urged the elimination of this language, which he condemned for its introduction of a dual and inconsistent regulatory scheme (*infra*, pp. 59-64). Again the Commission's position was vindicated. Cf. § 2 of Pub. L. 87-346 (October 3, 1961), 75 Stat. 763, 764.

Speculation as to why, when it is subjected to the harmonizing ministrations of the Solicitor General, the Commission (Brief, p. 11) suddenly "takes no position" (but has its attorneys subscribe to a brief which reverses its position in the courts below), may be of interest to a student of the independence of the "independent" regulatory agencies, but probably has no direct bearing upon the issue at hand. However, the collision between the Commission and the Solicitor General serves to emphasize the necessity of maintaining the complete integrity of the doctrine of supersession of the antitrust laws in matters within the ambit of the Shipping Act. If, as we contend, Congress substituted a program of regulated agreements, in the case of ocean carriers, for the outright prohibitions of the antitrust laws, with the regulation to be done by the Commission, then the Department of Justice need not concern itself with a duplicate regu-

[4] H. R. 4299, § 2, Draft Revision No. 2 [Committee Print] (April 13, 1961), set forth in *Index to the Legislative History of the Steamship Conference/Dual Rate Law*, Sen. Doc. No. 100, 87th Cong., 2d Sess. (1962) 78.

latory program under antithetical statutory commands.[5] Its only function is to administer the prosecution of criminal and civil penalty proceedings under the *Shipping Act*, and *after the Commission* has determined that violations of *that Act* have occurred. To the extent that private treble damage suits are intended to constitute the injured public as a sort of auxiliary police to gun down *antitrust* violators, they are equally inconsistent with the program enacted by Congress for the regulation of ocean carrier agreements and for the awarding of damages to those injured by violations of that regulatory program.

Statutory Provisions Involved

For the convenience of the Court, we set forth as Appendix A hereto the complete provisions of §§ 15 and 22 of the Shipping Act, 1916, omitting amendments enacted after the transactions here involved occurred.

SUMMARY OF ARGUMENT

I

In *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408 (1932), this Court held that an antitrust complaint of a private party seeking an injunction against concerted activity

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[5] Regarding the unwisdom of conferring upon the antitrust-oriented Department of Justice the power to gag regulatory agencies in litigation, see Auerbach, *The Isbrandtsen Case and Its Aftermath, Part II*, 1959 Wis. L. Rev. 369, 387-8 f.n. 287. Professor Auerbach was, as stated in the first footnote to Part I of his article, co-counsel for petitioners Japan-Atlantic and Gulf Freight Conference and its members in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958).

of common carriers by water had properly been dismissed on the ground that complete relief, both substantive and procedural, was provided under the Shipping Act, which *pro tanto* superseded the antitrust laws. This was held to be so whether or not the agreement for the concerted action had been filed with, or approved by the Commission. 284 U.S. at 485-487. Under the Shipping Act, primary jurisdiction was in the Commission, subject to judicial review under that Act.

Again in 1952 this Court held that the antitrust laws had been superseded by the Shipping Act and that primary jurisdiction of cases under the Shipping Act was in the Commission. This was the holding of *Far East Conference* v. *United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576. The only distinction which was attempted to be drawn in *Far East Conference* between that case and *United States Navigation Co.* was that in *Far East Conference* it was the Government which sought an injunction under the antitrust laws, whereas *United States Navigation Co.* was a suit by a private party. The purported distinction was rejected (342 U.S. at 576).

Prior to the instant case another circuit had occasion to pass on the question whether the Shipping Act had superseded the antitrust laws for the purpose of private suits for damages as well as suits seeking injunctive relief. In *American Union Transport* v. *River Plate & Brazil Conferences*, 126 F. Supp. 91 (S.D.N.Y. 1954), aff'd on opinion below, 222 F. 2nd 369 (2d Cir. 1955), it was held that a freight forwarder seeking treble damages under the antitrust laws on the ground that the defendant carriers had by

an unapproved agreement conspired to deny brokerage to the plaintiff, was not entitled to antitrust relief but must proceed for the relief afforded by the Shipping Act. The complaint was accordingly dismissed. The court's decision, like that of the courts below in the present proceedings, was predicated upon *United States Navigation Co.* and *Far East Conference,* notwithstanding the efforts of the plaintiff to distinguish those cases on the ground that they involved injunctive relief, whereas *American Union Transport* was seeking damages.

Petitioner's effort to infer from *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 78 S.Ct. 851, 2 L.Ed. 2d 926 (1958), a dilution of the doctrine of *United States Navigation Co.* and *Far East Conference* is without foundation. That case, which came into court on a petition to review a Commission order of approval under § 15 of the Shipping Act, involved no question of supersession. The disagreement between the majority and the dissent of Mr. Justice Frankfurter, regarding the implications of the primary jurisdiction doctrine for the question of illegality *per se* of contract rate systems, has no relevance for the issue of supersession, and the majority broadened rather than narrowed the scope of the Commission's primary jurisdiction under the Shipping Act.

On the basis of precedent, the decision below would appear to have been compelled by *United States Navigation Co.* and *Far East Conference,* and is in harmony with the Second Circuit decision in *American Union Transport.*

II

The decision below was correct in principle as well as on the basis of precedent. The numerous decisions cited by petitioner as evidence of the narrowing of the supersession doctrine were all decided in connection with the accommodation between the antitrust laws and regulatory statutes other than the Shipping Act. In each of those decisions there may be discerned the absence of one of the conditions upon which supersession is based. The regulatory statute did not substantively deal with the factual situation presented; or it did not provide any remedy in the premises; or Congress clearly manifested a purpose that the regulatory scheme was not to supersede antitrust jurisdiction over competitive and anti-competitive practices in the particular industry.

Section 15 of the Shipping Act catalogs types of agreements of ocean carriers as those types were found to exist during the course of a two year congressional investigation of ocean carrier agreements. It requires the filing of all such agreements with the Commission. It makes it unlawful to carry out an agreement which has not been filed with and approved by the Commission. At the relevant times it provided a civil penalty of $1,000 per day for each violation of § 15. There can be no question but that the substantive requirements of § 15 of the Shipping Act encompass the conduct of the respondents alleged in the complaint herein.

Section 22 of the Shipping Act authorizes the Commission, upon a complaint charging a violation of the

Shipping Act and seeking reparation for the injury caused thereby, to direct the payment of full reparation for such injury. Thereby the Shipping Act provides its own remedy for the purpose of making whole a party injured by a violation of the substantive provisions of the Act.

Thus the prerequisites for supersession, *i.e.,* that there be an all-pervasive regulatory scheme, and the provision of a remedy for its violation, are met in the present case. These factors are reinforced by the absence from the Shipping Act of provisions found in many other regulatory statutes which specifically preserve for parties claiming injury at the hands of members of the regulated industry the right to pursue in court their remedies at common law or under other statutes. Congress has never more clearly than in the Shipping Act indicated the purpose of committing the regulation of an industry and, specifically, its agreements in any way restricting competition, to the exclusive jurisdiction of an administrative agency created for that very purpose.

III

The 1914 report of the House Merchant Marine and Fisheries Committee, which, after two years of investigation by the Committee, set the stage for the drafting and enactment of the Shipping Act, 1916, clearly evinces the Committee's recognition that the solution of the problems created by agreements among ocean carriers was to be found, not in the application to such agreements of the antitrust laws, but rather in the subjection of such agreements to regulation by an administrative agency which would be able, under

the criteria set forth for its guidance, to assure to the public the benefits of the many good features of such agreements while protecting the public against the several bad features which the Committee found to exist. Such a regulatory purpose could not possibly be achieved by subjecting the industry to the pulling and hauling of simultaneous commands under such diametrically opposed enactments as the Shipping Act and the antitrust laws.

During the 1961 proceedings which led to substantial amendments of the Shipping Act, including § 15 thereof, attempts were made to amend the final paragraph of § 15 to make the specific penalty for violation thereof cumulative "to the penalties provided by the antitrust laws". After testimony on this version of the bill, the penalty provision of § 15 was relieved of this new concept. In the bill which was finally passed the penalty provided in § 15 remains exclusive. The legislative history of Pub. L. 87-346 may be regarded as an endorsement of the philosophy of *United States Navigation Co.* and *Far East Conference.*

ARGUMENT

I. The Decision Below Appears Consistent With, If Not Required By, Precedent.

A. On both prior occasions when the issue was before it, this Court held the Shipping Act to have superseded *pro tanto* the antitrust laws.

Preliminarily we emphasize, as petitioner itself has stated (Brief, page 6), that the gravamen of the present complaint is that by an unapproved agreement the respondents enhanced the rate charged to petitioner for the transportation of evaporated milk from United States Pacific Coast ports to Manila. It is solely by virtue of the claim that there was enhancement of the rate *by illegal agreement* that petitioner has sought to enrich itself by seeking the treble damage remedy of the antitrust laws, rather than making a timely complaint for reparation under the Shipping Act.

On two occasions, separated by a period of twenty years, this Court has been called upon to determine whether anti-competitive practices of ocean carriers are subject to the antitrust laws. On both occasions this Court has said that they are not, and that they are exclusively subject to the provisions of the Shipping Act, 1916, and specifically § 15 thereof (39 Stat. 733, 46 U.S.C. §814).

In *United States Navigation Co.* v. *Cunard Steamship Co., Ltd.*, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408 (1932), the bill in equity of one ocean carrier charged

that the respondent ocean carriers had established a contract rate system which coerced shippers to patronize them exclusively and, consequently, excluded complainant from the trade. An injunction against the conduct of the respondents was sought under the Sherman Act and the Clayton Act.

This Court affirmed the decree below, which had dismissed the bill. It did so notwithstanding that the bill asserted that the agreement of the respondents had not been filed with the Commission.

After reviewing the pertinent provisions of the Shipping Act this Court stated (284 U.S. at 485-487):

> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and *the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws.* Compare *Keogh* v. *Chicago & N. W. Ry. Co., supra,* at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board.
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> "There is nothing in §15 of the Shipping Act which militates against the foregoing views. That section requires that agreements between carriers, or others subject to the act, in respect of a number of enumerated matters, or 'in any manner providing for an exclusive, preferential, or coöp-

erative working arrangement,' shall be filed immediately with the board; and that the term 'agreement' shall include understandings, conferences, and other arrangements. Thereupon, the board is authorized to disapprove, cancel or modify any such agreement, 'whether or not previously approved by it,' which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., 'or to operate to the detriment of the commerce of the United States, or to be in violation of this Act.' *But a failure to file such an agreement with the board will not afford ground for an injunction under §16 of the Clayton Act at the suit of private parties—whatever, in that event, may be the rights of the government —since the maintenance of such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist. If there be a failure to file an agreement as required by §15, the board, as in the case of other violations of the act, is fully authorized by §22, supra, to afford relief upon complaint or upon its own motion.* Its orders, in that respect, as in other respects, are then, under §31, *for the first time,* open to a judicial proceeding to enforce, suspend or set them aside in accordance, generally, with the rules and limitations announced by this court in respect of like orders made by the Interstate Commerce Commission." (Italics supplied.)

It would be difficult to conceive of a clearer holding that all charges of illegal concerted activities of common carriers by water constitute charges of violation

of the Shipping Act, and specifically, §15 thereof, *and not* charges of violation of the antitrust laws. No more clearly could it be stated that the rule applies whether the agreement or combination or working arrangement is claimed to have been filed with the Commission or not.

In view of the cautious reservation in the *United States Navigation Co.* opinion regarding the rights of the Government, it is not too surprising that in 1948 the Government instituted a civil antitrust action seeking an injunction against the use by the Far East Conference of a contract rate system. There, too, it was contended that the concerted action did not attain exemption from the antitrust laws because no agreement had been filed with or approved by the Commission. One of the grounds on which the District Court denied the motions of the Conference and of the Commission to dismiss the complaint was that the exemption from the antitrust laws created by §15 of the Shipping Act is a narrow one, limited to agreements lawful under §15 (*United States* v. *Far East Conference,* 94 F. Supp. 900, 902-903 (D.N.J. 1951)).

The District Court decision was reversed with directions to dismiss the complaint in *Far East Conference* v. *United States,* 342 U.S. 570, 72 S. Ct. 492, 96 L. Ed. 576 (1952). This Court stated the question before it and the basis for its answer as follows (342 U.S. at 573):

> "At the threshold we must decide whether, in a suit brought by the United States to enjoin a dual-rate system enforced in concert by steamship carriers engaged in foreign trade, a District Court can pass on the merits of the complaint before the

> Federal Maritime Board has passed upon the question. We see no reason to depart from *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474. That case answers our problem."

The Court pointed out that the sole factual distinction between *United States Navigation Co.* and the case before it was that in the earlier suit it was a private party who invoked the antitrust laws, whereas in *Far East Conference* the suit was brought by the Government. Regarding this distinction the Court said (342 U.S. at 576):

> "The sole distinction between the *Cunard* case and this is that there a private shipper invoked the Antitrust Acts and here it is the Government. This difference does not touch the factors that determined the *Cunard* case. The same considerations of administrative expertise apply, whoever initiates the action. The same Antitrust Laws and the same Shipping Act apply to the same dual-rate system. To the same extent they define the appropriate orbits of action as between court and Maritime Board."

It thus appears that this Court was not inclined to confine the doctrine of *United States Navigation Co.* or to avoid its application on the basis of labored efforts at distinction. The antitrust laws have been superseded as to one category of suitor. They were also superseded as to any party entitled to proceed before the Commission under the Shipping Act.

We submit that it follows equally logically that if the Shipping Act has superseded the antitrust laws, it has done so both with respect to suits seeking injunc-

tive relief and with respect to suits seeking damages. This is true because the Commission, upon a proper complaint, is authorized to afford either kind of relief under §22 of the Shipping Act, and to subject ocean carriers to punitive damages for violation of the antitrust laws would destroy the unitary and quite different regulatory program of the Shipping Act.

Our contention that *United States Navigation Co.* and *Far East Conference* govern the present case notwithstanding the difference in relief sought, is supported by *American Union Transport* v. *River Plate & Brazil Conferences,* 126 F. Supp. 91 (S.D.N.Y. 1954), aff'd on opinion below, 222 F. 2d 369 (2d Cir. 1955). There, a freight forwarder claimed that the defendant conference and its members had, without requisite approval under §15 of the Shipping Act, agreed that none of the conference members would pay to the plaintiff a brokerage commission on particular shipments. The defendants moved to dismiss. The motion was granted, notwithstanding efforts of the plaintiff to distinguish *United States Navigation Co.* and *Far East Conference* on the ground that they involved complaints for *injunctions* regulating future conduct rather than suits for *damages* based on past conduct, and notwithstanding the further effort of the plaintiff to elevate the dissenting opinion in *Far East Conference* (342 U.S. at 578) to the status of a rule of law. After quoting from the opinion in *United States Navigation Co.,* the court said (126 F. Supp. at 93):

> "The failure to file an agreement, therefore, whatever other effect such failure may have, does not leave the offending parties 'at large', subject to

the antitrust laws. If there is any inconsistency apparent between this conclusion and the language of §15 of the Shipping Act, as pointed out by Mr. Justice Douglas, the clear language of the Supreme Court authoritatively compels the decision."

Thus both the courts below and the United States Court of Appeals for the Second Circuit have interpreted *United States Navigation Co.* and *Far East Conference* as precluding suits for treble damages under the antitrust laws against parties whose agreements are within the substantive coverage of §15 of the Shipping Act.

B. The doctrine of United States Navigation Co. and Far East Conference has not been abandoned or diluted as contended by the petitioner.

Here, as in the courts below, petitioner argues (Brief, pp. 86-92) that *Federal Maritime Board* v. *Isbrandtsen Company,* 356 U.S. 481 (1958), seriously weakened or destroyed the holdings of *U.S. Navigation* and *Far East Conference.* Petitioner candidly states (Brief, p. 86) that *Federal Maritime Board* v. *Isbrandtsen* was not a "primary jurisdiction case". What should be emphasized is that it was not a *supersession* case. The antitrust laws were not involved, since the case arose on a petition to review an order of the Board granting an approval under §15 of the Shipping Act.

In essence, petitioner's argument seeks to extract from the dialogue between the majority and the dissenters in *Federal Martime Board* v. *Isbrandtsen* such

a debilitation of the primary jurisdiction doctrine as to knock out one of the props common to the supersession and primary jurisdiction doctrines, *i.e.*, the desirability of having a panel of experts, created for that purpose, adjudicate technical questions in the economic regulation of an industry subjected to a specific regulatory statute. Petitioner's argument is wide of the mark because of its failure to appreciate the argument made to this Court by the petitioner, the Japan-Atlantic & Gulf Freight Conference, in *Federal Maritime Board* v. *Isbrandtsen*, to which the cited portions of the majority and of the dissenting opinions were directed. It will be recalled that in *Federal Maritime Board* v. *Isbrandtsen*, the Board's order approving a contract rate system of the Japan-Atlantic & Gulf Freight Conference (hereinafter, "JAGFC"), had been set aside on the petition of Isbrandtsen on the ground that the contract rate system was illegal *per se* under §14 Third of the Shipping Act, 1916, 39 Stat. 733, as amended (46 U.S.C. §812 Third). *Isbrandtsen Company* v. *United States*, 99 App. D.C. 312, 239 F. 2d 933 (1956).

On certiorari to review the decision of the Court of Appeals, the petitioners argued that *U.S. Navigation Co.* and *Far East Conference* precluded a holding that the contract rate system was illegal *per se*. See, *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 496. The argument is fully spelled out in the brief for JAGFC, petitioner in No. 74, October Term, 1957, of this Court, at pp. 50-57. It was there pointed out that *U.S. Navigation Co.* and *Far East Conference* both arose on complaints in equity for injunctions under the antitrust laws against the continuation of contract rate systems. In both cases, the complaints

were ordered dismissed, notwithstanding that in both cases it had been argued that contract rate systems were prohibited by the Shipping Act and, therefore, were incapable of approval. JAGFC contended that under appropriate principles of pleading, the complaints in those cases would not have been dismissed if a claim for court relief had been stated, either under the antitrust laws or under the Shipping Act. Since the opinion in *U.S. Navigation* particularly referred to *Great Northern Ry. Co.* as not calling for dismissal of court proceedings and resort to administrative remedies where there is only an issue of law involved, JAGFC argued that the dismissal of the complaints in *U.S. Navigation* and in *Far East Conference*, of necessity, meant that this Court was of the view that, under appropriate facts and circumstances, contract rate systems would not be unlawful and could be approved by the Board.

Against this background, it appears that the majority in *Federal Maritime Board* v. *Isbrandtsen* did, in theory at least, accept the JAGFC argument and reject the holding of the Court of Appeals that contract rate systems were unlawful *per se*. Thus the majority stated (356 U.S. at 499):

> "This consideration, moreover, is particularly compelling in light of our present holding. Since, as we hold, §14 Third strikes down dual-rate systems only where they are employed as predatory devices, then precise findings by the Board as to a particular system's intent and effect would become essential to a judicial determination of the system's validity under the statute. In neither *Cunard* nor *Far East Conference* did the Court have the assistance of such findings on which to

base a determination of validity. We conclude, therefore, that the present holding is not foreclosed by these two cases."

Thus, the unlawfulness of contract rate systems appears to have been made to depend on the findings of the administrative agency in the particular case with respect to the impact of the proposed contract rate system upon outside competition.

The dissenting opinion (356 U.S. at 500, *et seq.*) of Mr. Justice Frankfurter, who had written the majority opinion in *Far East Conference,* consists in part of a disagreement with the majority as to the practical consequences of its decision. Looking at the realities of competitive practices in ocean transportation, Mr. Justice Frankfurter was of the opinion that the majority had, in fact, not laid down a criterion under which some contract rate systems might be lawful and others unlawful, since there was every reason to believe that the same findings as were made in the case of JAGFC would have to be made in any case involving a contract rate system (356 U.S. at 502-503). Thus, he reasoned, the majority had held contract rate systems to be illegal *per se,* and, in so doing, had failed to take account of the tenet of the primary jurisdiction doctrine which precludes the doctrine from ousting a court of jurisdiction *under the regulatory act* when there is only a pure question of law involved (356 U.S. at 517-523).

Viewed against the background of the contentions as to illegality *per se* under the Shipping Act, it is clear that the majority in *Federal Maritime Board* v. *Isbrandtsen* adhered to the primary jurisdiction doc-

trine, and that the dissent took the majority to task for indirectly extending that doctrine to cover cases which could be decided by the courts on a pure question of law.[6] Nothing in all of this involved the *supersession* doctrine, since that case was in court on a properly grounded petition for review of an order of approval under §15 of the Shipping Act. The case presented no problem of judicial jurisdiction under the antitrust laws *vis-a-vis* administrative jurisdiction under the Shipping Act.

Petitioner also seeks support for its contention that *United States Navigation Co.* and *Far East Conference* have become debilitated by reference to great numbers of cases decided within the context of regulatory statutes other than the Shipping Act. This approach ignores the salient features of the Shipping Act upon which the holdings of supersession by that Act have been grounded—features which were not present in the same combination in other regulatory statutes with respect to which supersession has been held to apply to a limited extent or not at all.

The following attributes of the Shipping Act combine to make appropriate the broadest application of the supersession doctrine in shipping matters:

1. Section 15 of the Shipping Act requires the filing with the Commission and its approval or disapproval of every conceivable agreement among ocean carriers which provides for the establishment of rates or in any other respect de-

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[6] A searching analysis of the implications of *Federal Maritime Board* v. *Isbrandtsen* for the primary jurisdiction doctrine appears in Auerbach, *The Isbrandtsen Case and Its Aftermath, Part II*, 1959 Wis. L. Rev. 369, 374-386.

stroys, limits or affects competition. It even encompasses such broad categories of agreements as a "cooperative working arrangement", which may or may not affect competition among the parties. Section 15 erects the standards by which the Commission must disapprove agreements. It provides a severe civil penalty for violations. It may be noted that one of the standards for disapproval is a finding that the agreement is in violation of the Shipping Act, and that thus a carrier agreement is vulnerable to disapproval not only if it runs afoul of the criteria of §15 itself, but also if it violates any of the other commands of the Shipping Act.

2. Section 22 of the Shipping Act authorizes the Commission, on a sworn complaint filed by any person, to investigate any violation of the Shipping Act and to make such order as the Commission deems proper. If the complaint asks reparation for injury caused by a violation of the Shipping Act, the Commission is authorized to direct the payment of full reparation for such injury.

3. Nowhere in the Shipping Act is there any provision authorizing suit in court for violations of the Shipping Act or saving to suitors their remedies under other statutes or at common law.

A case which illustrates the effect for the purposes of the supersession doctrine of the absence of one or more of the above features in a regulatory statute is *S.S.W. Inc.* v. *Air Transport Ass'n of America*, 89 App. D. C. 273, 191 F. 2d 658 (1951). There one air carrier sought both injunctive relief and treble dam-

ages under the antitrust laws against other air carriers and their trade association. The District Court for the District of Columbia had ordered the complaint dismissed on the ground that the subject matter was covered by the Civil Aeronautics Act and that the case was therefore within the primary jurisdiction of the Civil Aeronautics Board.

On appeal, the Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court and remanded the cause for retention by the District Court while the appellant sought its remedies from the C.A.B. In reaching this result, the court fully recognized the scope and purpose of the supersession doctrine of *United States Navigation Co.* (191 F. 2d at 661-663). Comparing the substantive provisions of the Civil Aeronautics Act with the allegations of the complaint, the court concluded that the Act covered the dominant facts alleged as constituting violations of the antitrust laws. It followed that, since the C.A.B. had power to issue cease and desist orders against unfair methods of competition and deceptive practices and to approve or disapprove contracts and agreements among air carriers, the appellant must proceed before the C.A.B. and not in court in seeking injunctive relief (191 F. 2d at 662-663). The court specifically noted that absence of C.A.B. approval of the agreements and understandings charged in the complaint did not alter this conclusion. At this point it quoted the material from *United States Navigation Co.*, 284 U.S. at 487, which we have quoted, *supra*, at pp. 14-15 hereof.

However, the court also concluded that the appellant was not deprived of its right to seek treble damages

for violations of the antitrust laws and that, after the C.A.B. had made its determination, the appellant would be entitled to proceed under the antitrust laws except as to matters within the C.A.B.'s jurisdiction which the C.A.B. should find to be legal under the Civil Aeronautics Act. In reaching its conclusion regarding the damages aspect of the complaint, the court stated (191 F. 2d at 663-664):

> "The prayer for treble damages under the antitrust laws raises a different problem. *The Civil Aeronautics Act, unlike* the Interstate Commerce Act and *the Shipping Act, does not authorize the award of damages by the Board for violation of its provisions.* Where specific damage provisions are contained in regulatory statutes, it has been held that there may be no recovery of treble damages under the antitrust laws. And this even in a statute such as the Interstate Commerce Act which contains a clause saving all preexisting remedies at common law or by statute. Here, however, we have both a saving clause, which provides that 'Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies' and a statute which conspicuously makes no provision for damages. *Reading the saving clause in the light of congressional failure to provide a remedy for damages in the Civil Aeronautics Act, we conclude that Congress did not intend to deprive an air carrier of its right to seek treble damages for violations of the antitrust laws.* This accords with the Supreme Court's determination that it could grant injunctive relief under the antitrust laws against a combination of rail-

roads under circumstances where the Interstate Commerce Commission was not authorized to grant comparable relief." (Italics supplied.)

The selective application of supersession in *S.S.W., Inc.,* based upon the administrative power to enjoin under the aviation legislation and the lack of administrative power to award damages for violation of that legislation, was implicitly adopted by this Court in *Pan American World Airways* v. *United States,* 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963). There the Attorney General had instituted a civil antitrust suit at the instance of the C.A.B. This Court determined that the transactions charged as antitrust violations were "precise ingredients of the Board's authority" in administering substantive provisions of the aviation legislation (371 U.S. at 305). Turning to the remedial powers of the Board, the Court concluded that they were adequate to deal with any violations of the aviation legislation which a Board investigation might disclose (371 U.S. at 311-312). In reaching this latter conclusion this Court noted that "The Board has no power to award damages or to bring criminal prosecutions".

This Court concluded that the antitrust complaint in *Pan American World Airways* should be dismissed. In footnote 19 to the opinion (371 U.S. at 313) the Court said:

> "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course. See *United States Navigation Co.* v. *Cunard S. S. Co.,* 284 U.S. 474; *Far East Conference* v. *United States,* 342 U.S. 570, 577."

Thus, in 1963, was the current vigor of *United States Navigation Co.* and *Far East Conference* explicitly acknowledged.

When this underlying explanation of the application of the supersession doctrine in some cases, but not in others, is understood, the irrelevance of cases decided with respect to regulatory statutes other than the Shipping Act becomes clear. A brief analysis of the statutes involved in other cases will illustrate this point.

The Federal Trade Commission Act, 38 Stat. 717, as amended (15 U.S.C. §§41-58), is distinguishable by reason of the express statement in §11 thereof, 38 Stat. 724 (15 U.S.C. §51), that nothing therein shall be construed to prevent or interfere with the enforcement of the antitrust laws, etc., or to alter, modify, or repeal the antitrust laws.

The Communications Act of 1934, 48 Stat. 1064, as amended 47 U.S.C §§151-509, specifically authorizes suits in court for recovery of damages (§207, 48 Stat. 1073, 47 U.S.C. §207); and provides for a degree of applicability of the antitrust laws to licensed carriers subject to the Act (§313, 48 Stat. 1087, 47 U.S.C. §314).

The Natural Gas Act, 52 Stat. 821, 15 U.S.C. §§717-717w, provides for dual enforcement. Section 13, 52 Stat. 827, 15 U.S.C. §717l, provides for petitions to the Federal Power Commission. Section 22, 52 Stat. 833, 15 U.S.C. §717u, provides for suits in United States District Courts for enforcement of any liability or duty created by, or to enjoin any violation of, the Act.

A few cases cited by the petitioner and the Government deserve mention because they are quite in accord with our analysis and do not in any degree detract from the applicability of the supersession doctrine to the case at bar.

In *United States* v. *Borden Co.,* 308 U.S. 188, 60 S. Ct. 182, 84 L. Ed. 181 (1939), an indictment had been found against dairy farmers, distributors of milk, leaders of a union of milk truck drivers, and officials of the City of Chicago, charging that the defendants had conspired to fix the price to be paid to members of an association of milk producers for milk to be distributed in the City of Chicago.

The District Court sustained an attack upon the indictment on the ground that under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 248 (7 U.S.C. §§ 671-674) and its predecessor Acts, the Cooperative Marketing Act of July 2, 1926, 44 Stat. 802 (7 U.S.C. §§ 451-457), and the Agricultural Adjustment Act of 1933, 50 Stat. 246 (7 U.S.C. §§ 601-659), as well as under the Capper-Volstead Act, 42 Stat. 388 (7 U.S.C. §§ 291-292), the questions presented in the indictment were required in the first instance to be passed upon by the Secretary of Agriculture under an application of the supersession and primary jurisdiction doctrines.

This Court disapproved of the ruling of the District Court so far as concerns the Capper-Volstead Act, on the ground that the latter Act applied only to farmers and did not profess, under any circumstances, to give validity to combinations among farmers, distributors, labor union officials and city officials. The

Court ruled that, here, to use the expression adopted in *Terminal Warehouse Co.* v. *Pennsylvania R.R. Co.*, 297 U.S. 500, 515-516, 56 S. Ct. 546, 80 L. Ed. 827 (1936), was "a circumambient conspiracy". In this connection the Court said (308 U.S. at 204-205):

> "The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise. *In this instance, the conspiracy charged is* not that of merely forming a collective association of producers to market their products but *a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area,* and thus in effect, as the indictment is construed by the court below, 'to compel independent distributors to exact a like price from their customers' and also to control 'the supply of fluid milk permitted to be brought to Chicago.' 28 F. Supp. 180-182. Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in § 1 of the Capper-Volstead Act." (Italics supplied.)

This Court disposed of the contention that the application of the supersession doctrine was required by the provisions of the Agricultural Marketing Agree-

ment Act and its predecessor Acts upon the ground that those Acts, while validating agreements among farmers and handlers of agricultural products of a specified type if the Secretary of Agriculture should become a party thereto (the Secretary had not become a party to the agreement in question), did not go further and condemn as illegal or provide a punishment for agreements which had not thus been validated. In this respect, the Agricultural Marketing Agreement Act and its predecessor Acts differed distinguishably and sharply from the Shipping Act. Section 15 of the Shipping Act (46 U.S.C. § 814), while validating agreements of the specified types which should receive the approval of the Board, also condemns all such agreements which are not so approved and stamps them as illegal and provides the punishment therefor. That this is the distinction which this Court had in mind appears from the following language in *Borden* (308 U.S. at 200):

> "That the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched."

The Shipping Act not only specifies what agreements are valid but does "impinge" upon the prohibitions and penalties of the Sherman Act by specifically condemning private action in entering into agreements which have not been approved by the Board.

Petitioner also relies on *United States Alkali Export Association, Inc.* v. *United States,* 325 U. S. 196, 65 S. Ct. 1120, 89 L. Ed. 1554 (1945). *Alkali* involved charges of violation of the Sherman Act by parties to an association organized under the Webb-Pomerene Act, 40 Stat. 516 (15 U. S. C. §§ 61-65). This is the Act which authorizes American exporters to associate for purposes of acting cooperatively, with the limitation, among others, that such association shall not take any action which might result in the restraint or monopolization of interstate trade or which might tend to exclude other American merchants from the export trade. The statute does not itself prohibit or render unlawful any restraint or monopolization of interstate or foreign commerce. The Federal Trade Commission is given power to investigate any alleged violation of the law and, if it should find a violation and non-compliance with its subsequent recommendations, to refer its finding to the Attorney General of the United States for proper action (15 U. S. C. § 65). It has, however, no power to hear and determine questions of violation, or to issue orders imposing penalties or requiring cessation of the violations. The only remedies were under the Sherman Act. Monopolization or restraint of interstate trade continued to constitute a violation only of the Sherman Act and not of the Webb-Pomerene Act. That these were the points upon which this Court rejected defendants' contention that

prior resort to the Federal Trade Commission was a prerequisite to antitrust action is amply substantiated by the following language (325 U. S. at 206):

> "In determining whether the Webb-Pomerene Act curtailed the then existing authority of the United States to bring antitrust suits, it is important to consider what that Act did not do, as well as what it did. True, it exempted from the antitrust laws some, but not all, acts which would otherwise have been violations. *But while it empowered the Commission to investigate, recommend and report, it gave the Commission no authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations."* (Italics supplied.)

The Court then discussed the argument that Congress could not have contemplated concurrent jurisdiction of the Federal Trade Commission and the courts. It thereupon proceeded to say (325 U.S. at 208):

> "This argument overlooks the fact that the Commission's authority is to investigate and recommend, not to restrain violations of the antitrust laws (save as they may incidentally be violations of other statutes, which the Commission may enforce). The Commission, by its investigations and recommendations, may render a useful service in bringing violations to the attention of the Department of Justice or by showing that resort to the courts is unnecessary, either because there has been no violation or because the associations have satisfactorily corrected their trade practices. *But the Commission, under the Webb-*

Pomerene Act, does not enforce the antitrust laws; its powers are exhausted when it has referred its findings to the Attorney General. Indeed, the provisions for such reference are necessary not because the Commission has a primary jurisdiction, but only because it cannot itself enforce the antitrust laws. Further, there is no want of specific authority for the United States to enforce the antitrust laws; *the violations here alleged are not violations of the Webb-Pomerene Act, but of the Sherman Act, and it is the latter which provides for suits to be brought by the United States.*" (Italics supplied.)

United States v. *R.C.A.,* 358 U.S. 334, 79 S. Ct. 457, 3 L. Ed. 2d 354 (1958), also confirms the distinction we have drawn above between the cases announcing the supersession and primary jurisdiction rules in relation to the Shipping Act, and the cases qualifying those rules with respect to other regulatory statutes. There the Court, in passing upon the propriety of an antitrust divestiture of an acquisition approved by the Federal Communications Commission, distinguished between the limited regulation of the television industry which was there involved, and the regulation of carriers which was involved in the cases cited in opposition to antitrust jurisdiction. In the text of the opinion (358 U.S. at 346-348), the Court adverted principally to the rate regulation applicable to carriers, which would be disrupted by the exercise of coordinate antitrust jurisdiction. However, the significant point for the present case appears in footnote 16 to the opinion (358 U.S. at 347) where the Court said:

"* * * This Court in *Georgia* v. *Pennsylvania R. Co., supra,* took the position that shippers were

> entitled to have rates filed by carriers who were not parties to a conspiracy, even though the rates filed were the lowest which would be found to be reasonable. The risk that future filings would be at the uppermost limits of the zone of reasonableness was too great, and damage from the conspiratorial filings was presumed to flow. Of course, *when the agency is permitted to exempt from antitrust coverage rates filed cooperatively, the doctrine equally applies to an attack on the alleged conspiracy. United States Navigation Co.* v. *Cunard S. S. Co., supra; Far East Conference* v. *United States, supra.*" (Italics supplied.)

Thus, 6 years after *Far East Conference* and in the same year as *Federal Maritime Board* v. *Isbrandtsen,* this Court recognized that §15 is the superseding law of agreements, combinations, and conspiracies for ocean carriers.

Finally under this head, we advert to petitioner's cynical invitation to the dissenters in *Far East Conference* to vindicate their position by making this case the occasion to take advantage of the changes in the Court's membership which have occurred since 1952 (petitioner's brief, pp. 85-86, 99). Petitioner, on similar reasoning, urged the Court of Appeals to disregard *United States Navigation Co.* and *Far East Conference.* That court appropriately rejected the unseemly suggestion that it "overrule" decisions of this Court on the basis of its divination of shifts in point of view on the Supreme Bench (336 F. 2d at 656-657 and fn. 11; R. 167-168).

We respectfully urge that this Court equally firmly rebuff petitioner's morbid argument. To accept it

would be to establish a prominent position in legal research for notices of the retirements, deaths, and appointments of the Justices. The cause of the Rule of Law, rather than the Rule of Men would hardly thus be advanced. This consideration is most compelling in a commercial cause, where no great change in the understanding of broad social and economic problems has been shown to warrant a departure from established decisions.

II. The Decision Below Was Correct in Principle.

Under this head we argue that, whether it was compelled by precedent or not, the decision below should be affirmed because it was correct in principle.

A. The doctrines of supersession and primary jurisdiction are distinct.

Here, as in its arguments to the courts below, petitioner has hopelessly jumbled and confused two distinct doctrines—supersession and primary jurisdiction. Those doctrines have even been confounded with a third doctrine—exhaustion of administrative remedies.

Exhaustion of administrative remedies applies to situations in which a party to a proceeding before an administrative agency seeks to invoke judicial intervention before the administrative proceeding has run its full course.[7] Except in the most extraordinary circumstances, the courts will not interfere with the quasi-judicial process until the latter has run its full

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[7] Jaffe, *Primary Jurisdiction,* 77 Harv. L. Rev. 1037 (1964).

course, *i.e.,* until the party concerned has exhausted his administrative remedies. The rationale of the doctrine is much the same as that which restricts appeals from interlocutory determinations of trial courts.

Exhaustion clearly has no application where there has been no resort to the agency. Here the question is whether the plaintiff belongs in court at all. Petitioner sued in court under the antitrust laws, and we contend, as the courts below have held, that it has no claim under the antitrust laws but, rather, a claim under the Shipping Act, which is not cognizable in a court in the first instance. In support of our position we urge the applicability of two doctrines: first, supersession, and secondly, primary jurisdiction. Supersession focuses on the interrelationship of two statutory schemes, whereas primary jurisdiction concerns itself with but one statutory scheme, the only question being: is the agency or this court the proper forum in which to initiate the action.

The primary jurisdiction doctrine does not come directly to bear on the problem until the antitrust laws have been disposed of, for those laws clearly contemplate court jurisdiction. It is the supersession doctrine which eliminates the antitrust laws from the picture.

Supersession received its first clear and articulate explanation in *U.S. Navigation Co.* v. *Cunard S.S. Co., supra,* at pp. 13-16. There, as here, the complaint charged violation of the antitrust laws. There, as here, the defendant moved to dismiss.

In its opinion upholding the dismissal of the suit, the Court analyzed the substantive prohibitions of the Shipping Act and found that they dealt thoroughly with the grievances alleged in the complaint. 284 U.S. at 483-485. It then observed that the Shipping Act also contained a remedial provision whereunder, by complaint to the agency, the plaintiff could have redress. *Id.* at 486. It noted that the relief under the Shipping Act was available whether or not the concerted action of the defendants had been approved by the agency under §15 of the Shipping Act. *Ibid.* In short, it found that Congress had enacted a specific regulatory scheme which was all-encompassing and self-sufficient insofar as concerns concerted activities of common carriers by water in the foreign commerce of the United States. It concluded that the later enactment—the Shipping Act—*pro tanto* superseded the antitrust laws. *Id.* at 485.[8] Hence the term, supersession—which is not our invention but this Court's.

An additional reason for the supersession of the antitrust laws was this Court's conviction that Congress, by the Shipping Act, had intended to commit the regulation of ocean carriers to the expert agency

[8] See Mr. Justice Cardozo's statement in *Terminal Warehouse Co.* v. *Pennsylvania R. R. Co.*, 297 U.S. 500, 514-515 (1936): "The Commerce Act like the Shipping Act embodies a remedial system that is complete and self-contained. * * * For the wrongs that it denounces it prescribes a fitting remedy which, we think was meant to be exclusive. * * * The opinions of this court in their fair and natural extension point to that conclusion * * * [citing, *inter alia, United States Navigation Co.* v. *Cunard*]". See also, McGovern, *Antitrust Exemptions for Regulated Industries*, 20 Fed. Bar. J. 10 (1960); Mitchell, *Primary Jurisdiction—What It Is and What It Is Not*, Am. Bar Assn., Antitrust Section Rep., Vol. 13, pp. 26, 37-39 (1958); Ailes, *Some Procedural Problems of Primary Jurisdiction*, *Id.* 82, 86-7 (1958).

created to administer the Act, and not to diverse courts presumably having less occasion to familiarize themselves with the economic complexities attendant upon the business of the regulated carriers and their patrons. It is this aspect of the supersession doctrine which has probably given rise to the confusion between supersession and primary jurisdiction. However, we submit that the latter is not a prerequisite of the former. The essential point in determining whether the antitrust laws have any applicability is the extent to which, by later substantive and remedial provisions, Congress has manifested a purpose that anti-competitive activities of a particular industry should be dealt with under a separate law specifically enacted to govern those special activities.

Once it has been determined that the antitrust laws are inapplicable, it becomes necessary to decide whether action under the specific regulatory statute may be brought in court, or must be pursued before the regulatory agency. It is here that the doctrine of primary jurisdiction is the determining factor. The criteria for its application were most clearly stated in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922). It bears emphasis that *Great Northern* involved no question of the antitrust laws or their supersession. It did involve a determination of the nature of issues tendered under the Interstate Commerce Act which may be adjudicated by a court as well as the Commission, as contrasted with issues which, by their nature, must be resolved in the first instance by the Interstate Commerce Commission in the exercise of its technical *expertise*.

In the former category, the Court placed questions of law and of the interpretation of documents such as tariffs—the kind of questions with which courts regularly deal. In the latter category fell those questions which require for their resolution a flexible procedure for amassing an appropriate record and a background of expert knowledge of the technical and economic factors affecting the business affairs of the regulated carriers and their customers.

Great Northern was decided under the Interstate Commerce Act which, in §9, 24 Stat. 382, as amended, 49 U.S.C. §9, contemplates proceedings for damages for violation of that Act either before the I.C.C. or in a United States District Court. However, under the Shipping Act, there is provision for reparation complaints to the Commission, but *no* provision for damage suits in court. Accordingly, a party remitted to his rights under the Shipping Act can *only* obtain relief at the hands of the Commission, *regardless of the nature of the question involved.*

B. The prerequisites for the application of the supersession and primary jurisdiction doctrines are met in this case.

One predicate for the application of the supersession doctrine is that the specific regulatory statute must provide a pervasive scheme of regulation of the subject matter dealt with in the complaint—here, common carrier agreements. Section 15 of the Shipping Act, 1916, as amended prior to 1961, 39 Stat. 733, as amended, 46 U.S.C. §814 (set forth in Appendix A hereto) deals as pervasively and specifically as possible with the subject matter of concerted action of

common carriers by water in the foreign commerce of the United States. The first paragraph of §15 requires that every common carrier by water must immediately file with the Commission "a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act * * * to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements." As we shall show under a subsequent heading, this comprehensive catalog of carrier agreements was arrived at after two years of intensive congressional investigation having, as its primary objective, the discovery of the types of agreements prevalent among ocean carriers.

The second paragraph of §15 authorized[9] the Commission, by order, to disapprove, cancel or modify any agreement, "whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters,

[9] Since 1961, §15 *directs* the Commission to disapprove, cancel or modify agreements as to which the required findings are made. Sec. 15, as amended by §2 of Pub. L. 87-346, 75 Stat. 763.

importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act * * *". The Commission is directed to approve all other agreements.

The fourth paragraph of §15 provides that "agreements * * * shall be lawful only when and as long as approved by the * * * [Commission], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *".

The final paragraph of §15 provides:

> "Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Here we find a complete substantive regulation of agreements among common carriers by water. Even if a fertile imagination might conceive of a type of agreement which would not fall within one or more of the specific categories mentioned in the first paragraph of §15, or within the "catch-all" provisions of that paragraph, it suffices for present purposes that any agreement which fixes or regulates transportation rates, or controls, regulates, prevents, or destroys competition, is specifically covered. These categories certainly include the concerted action alleged in petitioner's complaint.

The succeeding paragraphs of §15 provide the clear criteria for disapproval and approval of agreements

under that section. They also provide the circumstances under which agreements will be lawful and the circumstances under which they will be unlawful *under that section of the Shipping Act.* Finally, the section sets forth a self-contained penal provision for violations.

Section 15, we submit, is a completely pervasive, substantive law regarding ocean carrier agreements. It has been described as, "in fact the antitrust law for the shipping industry". *American Union Transport* v. *United States,* 103 App. D.C. 229, 257 F. 2d 607, 610, cert. denied, 358 U.S. 828 (1958).

For the remedies available to private suitors in the event of violation of §15, reference must be made to §22 of the Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. §821) (Appendix A hereto). That section authorizes "any person" to file with the Commission a complaint, "setting forth any violation of this Act by a common carrier by water * * * and asking reparation for the injury, if any, caused thereby." If, after service on the parties charged with violation, the complaint is not satisfied, the Commission shall "investigate it in such manner and by such means, and make such order as it deems proper." The Commission "may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation."

Thus, for the violation of the system of substantive law of carrier agreements created by §15, the Congress created a complete remedial provision in §22 of the Shipping Act. That §22 calls for reparation in the amount of the exact injury suffered rather than treble damages reinforces our contention that the remedy is

exclusive. The Congress of the United States i rather knowing in the ways of the citizens of th Republic. It would hardly, in 1916, indulge in th idle gesture of creating a remedy in the amount o single damages for the same type of conduct whic would incur, under a 1914 enactment, liability fo treble damages.[10]

There is more, however, to support the exclusivenes of the Shipping Act remedy than the attribution t Congress of an awareness of human nature. An in portant objective of the Shipping Act, like other ac regulating carriers, was to secure uniformity of trea ment of patrons of the carriers. Thus, §16 of th Act, 39 Stat. 734, as amended (46 U.S.C. §815), pr hibits carriers from making or giving any undue o unreasonable preference or advantage to any partic lar person, locality, or description of traffic in an respect whatsoever. Section 17 of the Act, 39 Sta 734 (46 U.S.C. §816), prohibits rates, fares or charg which are unjustly discriminatory between shippe or ports, or unjustly prejudicial to exporters of th United States as compared with their foreign comp titors. Section 15, itself, as we have seen, requir the Commission to disapprove agreements which a unjustly discriminatory or unfair as between carrier shippers, exporters, importers, or ports, etc. Th whole objective of uniformity of treatment would b jeopardized if parties claiming to be injured by vi lations of the Act were free to go forum-shoppin Such was the rationale of the original primary juri diction case, *Texas & Pacific Railway* v. *Abilene Co*

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[10] The Government (Brief, p. 17), naively suggests that a shi per may have to *elect* between reparation under the Shippi Act and treble damages under the antitrust laws.

ton Oil Co., 204 U.S. 426, 439-442, 27 S. Ct. 350, 51 L. Ed. 553 (1907). The Court reached its result, notwithstanding the provision of §22 of the Interstate Commerce Act, 24 Stat. 387 (49 U.S.C. §22), specifically saving common law and statutory remedies, and providing that the Interstate Commerce Act remedies should be cumulative (204 U.S. at 446).

The rationale of the *Abilene Cotton Oil* case was applied in *Keogh* v. *C. & N. W. Ry. Co.*, 260 U.S. 156, 163, 43 S. Ct. 47, 67 L. Ed. 183 (1922), as the basis for a holding that a private party seeking damages under the antitrust laws on account of a rate charged by a carrier subject to the Interstate Commerce Act should not be entertained by the Court.

In the instant proceedings, if appellant were permitted to recover treble damages as found by a jury, it would, in effect, be receiving at the hands of the court a preference as compared with other shippers who consigned parcels of evaporated milk from the Pacific Coast to the Philippines at the same time as petitioner was making its shipments. If other evaporated milk shippers brought timely treble damage suits under the antitrust laws, the various juries could not be expected to ascertain damages on a uniform theory. To the extent that other shippers' suits may be time-barred, the preference is even more certain. This would be a complete subversion of an important objective of the Shipping Act. By omitting the "saving" clause which it had placed in the Interstate Commerce Act, Congress, in §22 of the Shipping Act, was really adopting, as to common carriers by water, the doctrine of the *Abilene Cotton Oil* case.

Petitioner makes the point that the Commission, at the time of the acts charged in the complaint, had no jurisdiction whatsoever over the reasonableness of rates in foreign commerce of the United States. This is quite correct. The only section of the Act dealing with reasonableness of rates, until 1961, was §18, 39 Stat. 735, 46 U.S.C. §817. Section 18 was limited to the rates of "every common carrier by water in interstate commerce". The 1961 amendments added §18 (b)(5), 75 Stat. 765, 46 U.S.C. §817 (b)(5), authorizing the Commission to disapprove rates in foreign commerce which, "after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States."

The limited jurisdiction of the Commission over the level of rates in United States foreign commerce is beside the point. Petitioner's claim is not that the rates charged it were unreasonable. Its claim is that they were higher, by reason of unlawful concerted action, than they otherwise would have been. Inevitably, petitioner is relegated to its right under §15 of the Shipping Act. Section 15 applies with full force to the foreign commerce of the United States, which is the commerce involved in this case.

Petitioner argues (Brief, p. 67), that a private treble damage suit under the antitrust laws, unlike a suit for an injunction under those laws, will not interfere with regulation under the Shipping Act. At the same time, petitioner also argues (Brief, pp. 29-31) that the purpose of the treble damage provision of the antitrust laws is not just to compensate the injured party, but to aid in the enforcement of the antitrust laws and the attainment of *their* broad social objective. No-

where does petitioner attempt to reconcile this contradiction. It would require some ingenuity to explain how a punitive provision designed to add teeth to the enforcement of laws condemning agreements in derogation of competition would in no way interfere with the administration of the Shipping Act, which contemplates lawful agreements fixing rates, limiting competition, etc.

Far East Conference saved the shipping industry from the dilemma of having to try to conform to the dictates of two governmental agencies—the Commission and the Attorney General—issuing antithetical commands under different statutes. The industry should now be saved from the possibility of having its conduct subject to the Shipping Act become the happy hunting ground for seekers of treble damages.

The Government urges (Brief, p. 17) that the allowance of the treble damage remedy under the antitrust laws will serve as an auxiliary device to induce carriers to file their §15 agreements. Petitioner claims that it did not know of the agreements on which the complaint is based until the Commission uncovered their existence in an investigation on its own motion (F.M.C. Docket No. 872, *Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference*) (Complaint, ¶27; R. 23-24).

This case is, then, hardly the place to argue the value of private assistance in the enforcement either of §15 of the Shipping Act or of the antitrust laws. Petitioner has not led the Government to its quarry; it has been riding on the Government's coattails.

That this is not an isolated instance of inverse operation of the Government's theory is also demonstrated by the flood of private treble damage suits which were instituted *after* and in the wake of the Government's action in the *Philadelphia Electrical Equipment Manufacturers' Case, e.g., Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.,* 326 F. 2d 575 (9th Cir. 1964), and *Westinghouse Electric Corp.* v. *City of Burlington, Vermont,* 326 F. 2d 691 (D.C. Cir. 1964). While those suits may have a cumulative punitive and deterrent effect under the antitrust laws, they can hardly be said to have played a role in ferreting out antitrust violations.

The completeness of the Shipping Act program for restitution and punishment in cases of violation of § 15 negates any requirement for duplicate investigative and enforcement efforts by private parties or by an arm of the Government other than the Commission.

Petitioner urges that to remit it to its remedy under the Shipping Act is to deny it the right to a jury trial which is guaranteed by Amendment VII to the Constitution. That argument indicts this Court for a serious oversight in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907); *Great Northern Railway Co.* v. *Merchants Elevator Co.,* 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922); and *Keogh* v. *Chicago & Northwestern Railway Co.,* 260 U. S 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922). All of these cases contemplated that a suitor seeking damages from a railroad on account of rates would, unless the suit turned on a pure question of law, have to press

his claim before the ICC. This was true notwithstanding the "savings" clauses in the Interstate Commerce Act (§§ 9 and 22, 24 Stat. 382, 387, 49 U. S. C. §§ 9, 22), and, in *Keogh,* notwithstanding that the suit was brought for treble damages under the antitrust laws.

Indeed, in *Keogh,* this Court referred to the differing verdicts of various juries in antitrust suits as an important reason for denying the right to antitrust relief (260 U. S. at 163). It did so even though the Plaintiff in Error there argued, as does the present petitioner, that it was entitled under the Constitution to have a jury pass upon the issues and assess the damages (260 U. S. at 159). Accordingly, the intimation of oversight is wide of the mark.

Congress is free to create substantive rights which were not known at the common law and, for those rights, to create remedies other than a suit in the nature of an action at law. It is equally free to make such a new cause of action exclusive of other rights. That is exactly what supersession means. By being limited to its rights before the Commission, petitioner would be deprived of its right to a jury trial only if some cause of action survived for which it would be entitled to demand a jury trial. However, if, as was held in *Keogh, American Union Transport,* and in the courts below, the antitrust laws have been superseded as to damage suits based on regulated carriers' agreements, then petitioner has no right to a jury trial of which it will be deprived.

Petitioner (Brief, pp. 19-20) and the Government (Brief, pp. 32-33) disagree regarding the effect of the

Commission's report and order in its Docket No. 872—*Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference* (served July 28, 1965). Petitioner asserts that the Commission's decision involved issues not presented in its antitrust suit and, in any event, that the Commission's decision is not yet final. The Government suggests that, since the Commission determined that respondents had made a number of rate-fixing agreements which remained unfiled and unapproved, the Commission has reinforced petitioner's claim (presumably, under the antitrust laws).

We submit that the Commission, having found unfiled and unapproved agreements (but not a secret agreement to dispense with the right of independent action provided in Article *Second* of F.M.C. Agreement No. 8200), has, indeed, reinforced petitioner's claim *under the Shipping Act*. If petitioner, either in lieu of, or in addition to, intervening in F.M.C. Docket No. 872, had prudently filed a timely complaint seeking reparation under the Shipping Act, instead of over-reaching for treble damages under the antitrust laws, the Commission's decision in Docket No. 872 indicates that some issues, at least, would have been resolved favorably to petitioner.

However, the Commission's decision is of no help to petitioner in its antitrust case. Unless this Court is to turn away from the supersession criteria of *United States Navigation Co.* and *Far East Conference*, the absence of filing and approval of the agreements involved is irrelevant. Petitioner's sole remedy remains a proceeding for reparation under the Ship-

ping Act. If petitioner has recklessly debarred itself from that right by gambling entirely on an outside possibility that it might get triple relief, it deserves no sympathy.

We submit that *United States Navigation Co.* and *Far East Conference* were correct in principle, and that the circumstance that the present case is a suit for treble damages under the antitrust laws presents no occasion for departing from the doctrine of those cases.

III. The Legislative History of the Shipping Act and of the 1961 Amendments Thereto Supports the Application of the Supersession Doctrine.

A. The Committee Report which was the foundation of the Shipping Act, 1916, evinces a purpose to supersede the antitrust laws as to shipping matters.

The Shipping Act resulted from an investigation conducted by the Committee on the Merchant Marine and Fisheries of the House of Representatives under the chairmanship of Hon. J. W. Alexander. The Committee conducted its investigation under successive resolutions adopted, respectively, on February 24, 1912, and June 18, 1912 (H. Res. 425, 62d Congress, 2d Session and H. Res. 587, 62d Congress, 2d Session).[11]

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[11] These resolutions are set forth in the Committee's report, H.R. Doc. 805, 63d Cong., 2d Sess. (1914) 8-10. Because the report and the transcript of the proceedings on which it was based have become rare documents, a special joint appendix containing voluminous excerpts, with the original pagination noted, was filed in *Federal Maritime Board* v. *Isbrandtsen*, Nos. 73 and 74 in the October, 1957, term of this Court.

Prior to the adoption of the former of these two resolutions, two antitrust actions had been instituted against steamship conferences—*Thomsen* v. *Union Castle Mail S. S. Co.,* 149 Fed. 933 (C.C.S.D.N.Y. 1907); rev'd, 166 Fed. 251 (2d Cir. 1908), retried (case not reported); rev'd *sub nom., Union Castle Mail S. S. Co.* v. *Thomsen,* 190 Fed. 536 (2d Cir. 1911); rehearing 190 Fed. 1022 (2d Cir. 1911); rev'd *sub nom., Thomsen* v. *Cayser,* 243 U. S. 66 (1917), in which shippers sued the members of the conference in the South African trade under Section 7 of the Sherman Act (15 U. S. C. §15) to recover treble damages, and *United States* v. *Hamburg-American S. S. Line,* 216 Fed. 971 (S. D. N. Y. 1914); rev'd as moot, 239 U. S. 466 (1915), in which the United States instituted an antitrust suit against the conference in the Transatlantic trade. Before the adoption of the second of the two resolutions authorizing the Alexander Committee investigation, two additional antitrust suits had been instituted by the United States against the conferences in the South American trade and the Far East trade, respectively—*United States* v. *Prince Line* 220 Fed. 230 (S. D. N. Y. 1915); rev'd as moot, 242 U. S. 537 (1917) and *United States* v. *American-Asiatic Co.,* 220 Fed. 230, 235 (S. D. N. Y. 1915); rev'd as moot, 242 U.S. 537 (1917). In essence, these actions charged that the conferences paid deferred rebates, employed fighting ships, and the like. The conferences defended upon the ground that the economic factors peculiarly affecting ocean transportation justified these practices and, hence, they were not in violation of the Sherman Act.

A mere reading of the enabling resolutions carries conviction that the House acted on the assumption that

shipping conferences were violative of the best interests of the commerce of the United States; but that the House was uncertain whether such conferences violated the Sherman Act or any other law of the United States. Under the authority of these resolutions, the Committee conducted a searching scrutiny of the entire subject for a period of almost two years.

Lest there be any doubt as to the legislative climate in which the Committee operated, it should be remembered that the major portion of its labors was performed during the life of the same Congress which adopted the Clayton Act. Moreover, all of the Court decisions (excepting the District Court decision upon the second trial of *Thomsen* v. *Union Castle Mail S. S. Co., sub nom., Thomsen* v. *Cayser* (not reported, and reversed in 190 Fed. 536 (2d Cir. 1911)), rendered in the antitrust cases above referred to prior to the adoption of the Shipping Act, had held that the Sherman Act did not condemn the conferences' practices. It, therefore, might have been expected that the Committee would recommend either a broadening of the Sherman Act so as to condemn conference action beyond peradventure, or would recommend the adoption of a separate law having similar effect.

A study of the House Committee Report is persuasive that, contrary to what might have been expected, it was the purpose of the Shipping Act to remove the shipping industry from the scope of the Sherman Act and to repose in the agency administering the Act exclusive jurisdiction to prohibit acts which constitute violations of the Shipping Act.

The Committee considered the effect of activities under conference agreements upon the economic life

of the nation and, we believe to its surprise, found i
good. It set forth in its Report (H.R. Doc. 805
supra, 295-303), in elaborate summary, a statemen
of the benefits which were claimed to arise fron
conference action. It would be impossible here t
condense this important summary but we believe tha
a synopsis of these advantages is here appropriate

(1) A substantial increase in sailing opportunitie

(2) Fixed and dependable dates of sailing at reg
lar intervals.

(3) Stability of freight rates over long periods
time, with the result, among others, that t
American exporter is enabled to quote pric
and make contracts for future delivery in co
petition with foreign merchants, without fe
that instability or violent fluctuations in freig
rates will introduce a speculative element in
his bargain.

(4) Conferences are impelled by self interest to
tablish rates which will enable their Ameri
shippers to compete successfully with forei
merchants in the common market.

(5) Uniform freight rates made available to
shippers irrespective of size, economic power
volume of shipments.

(6) Prevention of the elimination of weaker stea
ship lines.

(7) Maintenance of proper relationships betw
freight rates from various sources of sup
(*e. g.*, America, United Kingdom and Contine
to common foreign markets.

The Committee, however, also pointed out evils which had arisen in conference operation (H.R. Doc. 805, *supra,* 304-307). These evils consisted of abuses in which the conferences might at one time or another have indulged, but which were susceptible of correction by appropriate regulation.

Considering all of the foregoing, the Committee concluded that the real ill to which the shipping industry is subject is not the malady of monopoly and restraints on competition, but the affliction involved in cutthroat competition and rate wars. Having enumerated the advantages and considered the disadvantages of conference action, the Committee continued (H.R. Doc. 805, *supra,* 416-417):

> "These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. *The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and and peace when several lines engage in the same trade.* Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. *To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the sur-*

vival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. *Moreover, steamship agreements and conferences* are not confined to the lines engaging in the foreign trade of the United States. They *are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.*" (Italics supplied.)

Thus, the Committee voiced its opposition to the application of the antitrust philosophy to the steamship business. The Committee, of course, was obliged to find the substitute for the antitrust approach. This it did in its recommendations (H.R. Doc. 805, *supra*, 418) as follows:

"The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, *and can only be eliminated by effective Government control;* and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of." (Italics supplied.)

Regarding carrier agreements, the Committee's recommendation No. (2) (H. R. Doc. 805, *supra,* 419-420) was that all such agreements be required to be filed with the Interstate Commerce Commission, and that the Commission be empowered to order canceled any such agreements, or any parts thereof, which it might find to be discriminating or unfair in character, or detrimental to the commercial interests of the United States. The genesis of § 15 of the Shipping Act is plain to see, even though ultimately a new agency, the United States Shipping Board, was created to administer the Act. Most significant is the absence from the Committee's report and recommendations of any intimation that there should be any continuing applicability of the antitrust laws. Since the Committee had indicated the view that those laws would deprive United States commerce of the benefits of carrier agreements, the omission is only to be expected.

B. The legislative history of the 1961 amendments demonstrates a congressional purpose to continue supersession as to Shipping Act matters.

Following *Federal Maritime Board* v. *Isbrandtsen, supra,* decided in May, 1958, the entire matter of the regulation of ocean shipping was subjected to a searching 3-year reexamination by the Congress. Report of the Committee on Merchant Marine and Fisheries, House of Representatives, to accompany H.R. 6775, H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961) (hereinafter, the "House Committee Report") 114. The Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, conducted its own separate investigation. *Id.* at 117.

The first legislative product of the hearings was H.R. 4299, 87th Cong., 1st Sess., introduced on February 15th 1961 (*Index to the Legislative History of the Steamship Conference/Dual Rate Law, Public Law 87-346 (75 Stat. 762),* S. Doc. No. 100, 87th Cong., 2d Sess. (1962)[12] 57-67). Therein, the last paragraph of §15 of the Shipping Act was retained unamended (*Index* 63). Following further consideration, the House Merchant Marine and Fisheries Committee issued a committee print of draft revision No. 2 of H.R. 4299 on April 13th, 1961 (*Index* 69-85). In this version of the bill, the last paragraph of §15 was changed to read as follows (*Index* 78):

> "*In addition to the penalties provided by the antitrust laws* and any other laws, whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action." (Italics supplied.)

The House Committee held hearings on H. R. 4299 between March 20th and April 28th, 1961. On April 26th, 1961, Hon. Lee Loevinger, Assistant Attorney General in charge of the Antitrust Division, Department of Justice, testified to submit the Department's views on H.R. 4299. The following day he wrote to the Chairman of the Committee, enclosing a draft version of the bill "which would represent a version of the bill which the Department of Justice would not find objectionable." *Hearings Before The Special Subcommittee On Steamship Conferences of the Com-*

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12 Throughout, we will furnish alternate citations to this Index for 1961 legislative material as, "*Index* ".

mittee on Merchant Marine and Fisheries, House of Representatives, on H.R. 4229, 87th Cong., 1st Sess. (1961) 451-4. The Department's version of the last paragraph of §15 coincided with the Committee's draft version No. 2.

At the same hearings the Committee received the testimony of Hon. Thomas E. Stakem, then Chairman of the Federal Maritime Board. On the subject of the penalty provision of §15, Mr. Stakem stated (*Hearings, supra,* 459-60):

> "2. Draft revision No. 2 would expressly make the penalties provided by the antitrust laws and 'any other laws' applicable to any violation of sections 2, 3, and 4 of H.R. 4299, in addition to the penalties established by H.R. 4299 itself (p. 10, lines 8-9; p. 13, lines 23-24; p. 15, lines 11-12).
>
> "We believe that the penalties set forth in the act should be self-sufficient and that there should not be superimposed thereon the additional penalties of the antitrust laws and 'any other laws.'
>
> "Under draft revision No. 2 it could be argued that, even if a violation of the Shipping Act does not constitute a violation of the antitrust laws, the penalties of the antitrust laws are nevertheless applicable. Or, it might be argued that it means that where a violation of this act is also a violation of the antitrust laws or 'any other law,' the penalties of those laws would be applicable. Who is to adjudicate whether there is a violation of the antitrust laws or 'any other law'? Does this mean that *any person* is free to challenge the legality of a carrier's or other person's acts, under the antitrust laws or under the law of, say, the

State of California, by complaining to a court with jurisdiction to administer those laws? *We fear that draft revision No. 2 may erect separate and independent, and possibly conflicting, jurisdiction over shipping matters in other forums besides the Board.* Or, if it means that the Board will nevertheless have sole jurisdiction over these matters, it appears to require that the Board would have to administer not only the Shipping Act, but also the antitrust laws and any other laws.

"You will recall that section 15 of the Shipping Act, as it now reads, expressly allows for Board approval of price-fixing agreements and other agreements which violate the antitrust laws. *I do not believe that the antitrust laws can be built into the Shipping Act without introducing irreconcilable inconsistencies. It was no doubt for this reason, that the Shipping Act in its present form carves out exemptions from the antitrust laws,* ***and preempts*** *the field of shipping by placing it exclusively under the Federal jurisdiction erected in the Shipping Act.*

"In short, the language of draft revision No. 2 will invite argument that the legality or illegality of acts regulated by the Shipping Act cannot be determined by the standards of that act alone or by the Board alone, and that such acts must be held illegal if they offend against the antitrust laws, or 'any other law' as well. *It implies that State and Federal courts, as well as the Board, have independent jurisdiction over matters covered by the Shipping Act. This is at war with the traditional concept of primary jurisdiction of the Federal administrative agencies, a concept re-*

iterated time and again by the Supreme Court. It is the position of the Board that *matters falling within the ambit of the Shipping Act and brought thereby under the jurisdiction of the Board should stand or fall under the standards of that act; that violation of those standards should be punishable by penalties specified in that act; and that the administration of that act should be reposed in one Federal administrative board."* (Italics supplied.)

Under questioning by Hon. Thor Tollefson, Mr. Stakem further testified as follows (*Hearings, supra,* 470-1):

"Mr. Tollefson. Going to another item to which you called attention, on page 4 of your statement, No. 2, you make reference to the penalty provisions on pages 10, 13, and 15, and I think the language in each case is similar.

"Mr. Stakem. Yes, sir.

"Mr. Tollefson (reading):

" 'In addition to the penalities provided by the antitrust laws and any other laws, whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.'

"I am interested in knowing where this language came from.

"As Mr. Stakem has said, this makes it possible for the Justice Department to step in, in any case, *in a way that it has not been able to do heretofore under the law and under the decisions of the Supreme Court, is that not right?*

"Mr. Stakem. I think that is true. We feel very strongly about the inclusion of the antitrust language and the 'any other law' language because I think it waters down the jurisdiction of the Board and does create any number of problems that could be litigated.

"Mr. Tollefson. Well, as you have indicated in your statement, there would be two agencies, if I might call them that. You would have the Department of Justice on the one hand and your Board on the other being able to step into any situation where there was a violation and take action independent of each other, and you might even take different action, is that so?

"Mr. Stakem. That is true.

"Mr. Tollefson. There would not be any coordination necessarily between the Department of Justice and the Board.

"Mr. Stakem. Only to the extent that the Board would, by consultation on a daily basis work with the Antitrust Division in what they were doing in a particular case.

"Mr. Tollefson. I am very much disturbed by this language principally because of the anti-American merchant marine attitude of the Justice Department.

"*The Justice Department,* quite apparently and quite evidently from its testimony here the other day, indicates that, first, it has no sympathy with the American merchant marine and second, it *does not understand the problem of international shipping at all.*

"I suppose I should put in a third one there, that *they do not seem to care to know anything about it.*

"I would be worried if this language or these penalty provisions remain in the statute. I am very curious to know how they got in the bill.

"Mr. Stakem. I can only say, Congressman Tollefson, that this language did not come from the Federal Maritime Board and I would like to add to that that we have sincerely tried in consultation with the Justice Department to reconcile the views of Justice with the views of the Board and we were not able to reconcile the views, so that I think both of us come before this committee with a full disclosure of feelings on both sides so that this committee can make an informed judgment as to what the course of action should be." (Italics supplied.)

After the hearings, Chairman Bonner, on May 3rd, 1961, introduced a "clean" bill, H.R. 6775. Therein, the last paragraph of §15 was amended to provide (*Index* 92-3):

> "Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Thus the language which might have destroyed the supersession doctrine was, after deliberation, expurgated. It never crept back in.

H.R. 6775 was further amended in committee and was the subject of the House Committee Report of June 8th, 1961. Therein, the Committee stated (House Committee Report 13; *Index* 124):

> "The hearings of the committee have made it

> quite clear that our traditional antitrust concepts cannot be fully applied to this aspect of international commerce."

On the Senate side, numerous amendments proposed by Hon. Estes Kefauver with a view to restoring antitrust concepts to the bill, were considered and defeated. See 107 Cong. Rec. 18235-18247 (Sept. 14, 1961); *Index* 388-423.

As enacted and approved by the President, Pub.L. 87-346 remained free of any directions to the Commission to apply antitrust concepts and, particularly, *the last paragraph of §15 remained free of any provision which would subject the regulated parties to antitrust penalties.*

From the foregoing, it is abundantly clear that both Houses of Congress were familiar with the supersession decisions. Notwithstanding appeals to legislate those decisions out of existence, the Congress refused to do so.

In effect, the 1961 amendments to the Shipping Act may be considered to have codified *U.S. Navigation Co.* and *Far East Conference,* and the cases in which they have been followed and applied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of the complaint herein should be affirmed.

Respectfully submitted,

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New York, N.Y.
October 15, 1965.

APPENDIX A

Statutory Provisions Involved

Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. §§801-844.

Sec. 15, 39 Stat. 733 (46 U.S.C. §814), prior to 1961 amendment:

That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly dis-

criminatory or unfair as between carriers, ship-pers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each da

such violation continues, to be recovered by the United States in a civil action.

Sec. 22, 39 Stat. 736 (46 U.S.C. §821):

That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

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TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

All emphasis is ours unless otherwise indicated.
We use record references and abbreviations as in Petitioner's Brief.

In the Supreme Court of the United States

OCTOBER TERM 1965

No. 20

CARNATION COMPANY, a corporation,
Petitioner,
vs.
PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Petitioner's Reply Brief

I.

DEFENDANT-RESPONDENTS' CENTRAL POSITION THAT THE ANTITRUST LAWS WERE REPEALED HAS NO SUPPORT

With deference to the energies and learning of counsel for defendant-respondents, their euphemisms and circumlocutions do

not conceal that in an effort to sustain the judgment below they have been forced to take the position that the antitrust laws were, *pro tanto,* repealed by implication by *enactment* of Shipping Act, 1916.

The word "repeal" is anathema. We believe (without rereading defendant-respondents' briefs for verification of this precise matter) that it is not once used by defendant-respondents. Instead it is said that the antitrust laws, or the remedies of the antitrust laws (when the narrower expression will serve the purpose of the argument), have been "superseded" by Shipping Act, 1916, and particularly, by § 15 of the latter Act. The purpose is obvious. It is hoped, thus, to avoid coming to grips with the cases in Respondents' Brief, p. 50ff, dealing with the doctrine of repeal by implication and its stringent requirements, and holding the doctrine inapplicable where, as in the case at bar, there was a claim of conflict between the antitrust laws and an industry regulating statute: *Georgia v. Penn. R. Co.,* 324 US 439, *United States v. Borden Co.,* 308 US 188, *Silver v. N. Y. Stock Exchange,* 373 US 341, and *United States v. Philadelphia Nat. Bk.,* 374 US 321. Cf. *Hewitt-Robins v. Eastern Freight-Ways, Inc.,* 371 US 84, 89.[1] Secondly, it is hoped to get some virtue from the use of the word "supersedes" in *U. S. Nav. Co. v. Cunard Co.,* 284 US 474, where it was used in another context and for another purpose.

There can be no question of the meaning of "supersession" as used by defendant-respondents. They distinguish sharply be-

1. Here the question was not of survival of a statutory scheme but of a common-law remedy in the face of an industry regulating statute. "Survival" of the remedy was held to depend not on whether the industry statute provided remedies but "depends on the effect of the exercise of the remedy upon the statutory scheme of regulation." Cf., also, *Pan American Pet. Corp. v. Superior Court,* 366 US 656 holding the Natural Gas Act, 15 USC § 717ff did not deprive state courts of jurisdiction to entertain actions on contracts. Cf., also, *Laburnum,* 347 US 656, *Gonzales,* 356 US 617 and *Russell,* 356 US 634, dealt with in note 30 at page 32 of Petitioner's Brief.

tween the doctrine of primary jurisdiction and their doctrine of "supersession."[2] They are clear that it is their doctrine of supersession upon which they rely, not the doctrine of "primary jurisdiction" (*United States v. Western Pac. R. Co.*, 352 US 59, 63, quoted in Petitioner's Brief at p. 70),[3] and that their doctrine of "supersession" means that the antitrust statutes are removed from *all* consideration, not by reason of anything done by the agency charged with its administration (the Government supervision and control that is the core of the regulatory scheme), but by force of *enactment* of the statute alone.[4] This is the position urged and rejected in *United States v. Borden,* 308 US 188, holding that where, as here, the scheme was of Government supervision with power conferred upon an administrative agency, in the performance of *its* supervisory functions, to exempt from the operation of the antitrust statutes, it was the action of the agency exempt-

2. Indeed, we are charged with confusing the two (see FEC Brief, p. 36).

3. FEC Brief, p. 37, says: "The primary jurisdiction doctrine does not come directly to bear on the problem *until the antitrust laws have been disposed of, for those laws clearly contemplate court jurisdiction.* It is the supersession doctrine which *eliminates the antitrust laws* from the picture." It is further argued "that § 15 is the superseding law of agreements, combinations, and conspiracies for ocean carriers" (p. 35).

4. So in the PWC Brief we find: The question is stated as whether "the remedies and penalties of the Shipping Act here supersede the remedies and penalties of the Sherman Act" (p. 2). A section heading is "Congress intended Shipping Act remedies to supersede antitrust remedies" (p. 29) and it is flatly stated "that the antitrust laws do not apply to unfiled § 15 agreements" (p. 49). The FEC Brief to begin with, correctly, contends that "Congress substituted a program of *regulated* agreements, in the case of ocean carriers, for the outright prohibition of the antitrust laws, *with the regulation to be done by the Commission*" (p. 6), but it thereafter drops the reference to the *regulating* aspects and argues, of course, that even unapproved agreements are not subject to the antitrust laws. At p. 16 it states that the rule that there is no antitrust violation "applies whether the agreement or combination or working arrangement is claimed to have been filed with the Commission or not." Compare n. 3 above.

ing, and not the existence of the power, which worked the exemption.[5]

Defendant-respondents take this position neither willingly nor graciously.[6] They are forced to the full length of their argument because now, in no other way, can the judgment of dismissal be saved. The judgment cannot be saved if petitioner's position is correct, i.e., that though in some cases of claims of violation of the antitrust statutes by ocean carriers in foreign commerce, at some stage in the proceedings, there may appear a question that should be referred to the Commission, this is not such a case.[7] It is

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5. See also the other cases, dealt with along with *United States v. Borden Co.* in Petitioner's Brief at page 63ff, where there was no exercise of exempting power.

The result is the same in cases where the statute provides for administrative consideration of proposed action and confers power to prevent it but does not provide for antitrust exemption as in *United States v. R.C.A.*, 358 US 334, *California v. Fed. Power Com'n*, 369 US 482 and *United States v. Philadelphia Nat. Bk.*, 374 US 321.

6. See Footnote 9 below.

7. There is no occasion to repeat what we already have said of the primary jurisdiction doctrine is (see Petitioner's Brief p. 67ff). We recognize, of course, that in some actions against ocean carriers, brought under the antitrust statutes, an administrative question could arise which properly, under the primary jurisdiction doctrine, should be referred to the Commission. Such a question might be apparent at the very beginning of the antitrust litigation, or it might not appear until a later stage. Referral to the Commission would be appropriate whenever such a question appeared (*General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 US 422; *United States v. Western Pac. R. Co.*, 352 US 59; *United States v. Chesapeake & Ohio Ry. Co.*, 352 US 77). But there is no logic which says that a question proper for referral must necessarily arise in all actions brought against members of a regulated industry for alleged violation of the antitrust statutes. Whether there is a question, appropriate for referral, is not a foregone conclusion but must be determined case by case "based on the particular facts of each case" (*United States v. Western Pac. Ry. Co.*, 352 US 59, 69). It is our position that there is no such question in the case at bar; that the questions presented are usual and traditional in antitrust litigation, entirely familiar to courts and in respect of which courts from their own experience have all the competency that could be claimed for an administrative agency, and that, by consequence, under *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285, the *Meat Cutters Case, Local Union etc. v. Jewel Tea Co.*, 381 US 676, and like cases, this is a case where no referral ever was or is called for.

equally apparent, now, that if the Solicitor General's position is correct, i.e., that there was a preliminary question for the Commission, that the case in the District Court should have been stayed until the determination by the Commission and should proceed only in the light of the determination made by the Commission which, in theory, might require dismissal as in the second *El Dorado Case, (El Dorado Oil Works v. United States,* 328 US 12[8]), in view of determination actually made by the Commission the case must proceed to trial.[9] Defendant-respondents would like to be able to argue that even if the antitrust laws were not repealed by Shipping Act, 1916, still in some cases under the primary jurisdiction doctrine it is appropriate to dismiss an action under the antitrust statutes and that this was such a case. But the action taken by the Commission forecloses the argument.

Defendant-respondents can find no support for their position of repeal in the language of the statute. If Congress wanted the result argued for,—as to ocean surface carriers complete substitution of the Shipping Act 1916 in place of the antitrust statutes,

8. Cf. *Far East Conference v. United States,* 342 US 570, 576, and cases cited and Petitioner's Brief p. 85, n. 78.

9. Defendant-respondents have argued that it is not appropriate to take the position that this case, when it was commenced, if there were an administrative question, was one appropriate for a stay and referral to the Commission, the case to proceed after the Commission had made its determination because, so it is said, petitioner never took that position and it is not now open to the Solicitor General to take that position because this would be a reversal of position taken by the Commission as intervener below. The answers to this suggestion are short.

The position of petitioner below was simple. It was never offered a choice. It was faced with the motions to dismiss and it resisted dismissal. If the motion were properly granted that ended the matter. But, in considering the matter, it was for the court to determine whether the proper course were dismissal, or stay pending Commission determination, or trial without referral. Indeed, the question of retention and stay, as against dismissal, was considered and passed upon by the Court of Appeals (R. 186, 336 F2d 650, 667).

Whether or not it is open to the Solicitor General to question the decree, as an appellant could, is beside the point. The Solicitor General is entitled to confess error on *our* appeal. (Cf. *Bozza v. United States,* 330 US 160, 163).

by force of enactment of the Shipping Act alone,—it would have been a very simple matter for Congress to have said so, as the Solicitor General very pointedly suggests (Brief, pp. 20, 21. Cf. the repeal provision of the Transportation Act of 1940, Interstate Commerce Act, Part III, § 320, 49 USC § 920, App. to Petitioner's Brief, p. 50). A very slight change in the wording of the statute would have accomplished this with absurd ease. It also would have worked a marked departure from settled Congressional policy.[10]

Not only is there nothing in the language of Shipping Act, 1916, which lends support to defendant-respondents' argument of supersession (repeal) but the only language bearing upon the subject is to the contrary. (Petitioner's Brief p. 62ff) If, in the language of this Court (*United States v. American Union Transport*, 327 US 437, 447, n. 8) "in view of the statute's plain language" (Shipping Act, 1916 § 15) the exemption from the antitrust statutes "arises *not* upon the mere filing of the agreement *but only after approval* by the Commission" (emphasis in original) certainly an agreement is not exempt *before* approval by the Commission and most certainly is it not exempt where there has not even been filing and the Commission has had no opportunity to either approve or disapprove and take steps to prevent statutory violation. There is nothing to suggest the statute is putting a premium on avoidance of detection.

Defendant-respondents can get no comfort from the traditional doctrine of repeal by implication which requires that the statutes being compared be "absolutely irreconcilable" for a repeal by implication to be worked (*United States v. Greathouse*, 166 US

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10. We are not aware of any industry which has been completely exempted from the antitrust statutes. Certainly the railroads, the most thoroughly regulated of industries,—the classical example,—have not been completely exempted (*Georgia v. Penn. R. Co.*, 324 US 439). Not even labor unions are given blanket exemption (*United Mine Workers of America v. Pennington*, 381 US 657).

601, 605; Petitioner's Brief p. 50ff) and, indeed, defendant-respondents do not, and dare not, look to this doctrine for support.

Defendant-respondents do try to find support for their position in *U. S. Nav. Co. v. Cunard S. S. Co.,* 284 US 474, and *Far East Conference v. United States,* 342 US 570. But those are primary jurisdiction cases and not repeal by implication cases. If *Cunard* really meant repeal by implication (and not, where there is an appropriate administrative question, a mere preliminary employment of an administrative remedy "which *to that extent* supersedes" of the antitrust statutes) the court certainly expressed itself in a very curious way, took a very roundabout and ambiguous way of expressing what could have been said simply, directly and very shortly if it really meant repeal, and made a very poor selection of authorities to support its result when the authority whose reasoning was principally relied on *Great Northern R. Co. v. Merchants Elevator Co.,* 259 US 285, is one of the leading primary jurisdiction cases, is the leading case setting the limits of application of that doctrine and is a case which itself held that there was not there presented any administrative question which was an impediment to immediate processing of the case through the courts. As for *Far East Conference,* the decision was clearly wrong, if Shipping Act, 1916, worked a repeal of the antitrust statutes, when it said: "Having concluded that initial submission to the Federal Maritime Board is required, we may *either order the case retained* on the District Court calendar pending the Board's action (citing the two *El Dorodo Cases*) *or* order dismissal of the proceedings brought in the District Court." If the antitrust laws were really so "superseded" that they had no possible application to agreements of ocean carriers in foreign commerce, before filing and without approval, then the court had no choice but to dismiss.

If *Cunard* and *Far East Conference* really support defendant-respondents' position of supersession by *enactment* of the Shipping Act, 1916, then this court committed grave error in *Federal Maritime Board v. Isbrandtsen Co.,* 356 US 481, 498, when it said:

"Thus the Court's action in *Cunard* and *Far East Conference* is to be taken as a deferral of what might come to be the ultimate question—the construction of § 14 Third—rather than an implicit holding that the Board could properly approve the practices there involved. The holding that the Court had primary jurisdiction, in short, was a device to prepare the way, *if the litigation should take its ultimate course,* for a more informed and precise determination * * *."[11]

And if this court was in error in this *Isbrandtsen Case* it compounded the error in *United States v. R. C. A.,* 358 US 334, 348, in its citation of *Cunard* and *Far East Conference* for the proposition there stated and citing them "*as explained* in *Federal Maritime Board v. Isbrandtsen Co.,* 356 US 481, 497-499".

In *Cunard* and *Far East Conference* dismissal were proper, not because in *every* case against ocean carriers in foreign commerce the Shipping Act, 1916, provided complete relief through Commission action but because, *so far as appeared at the time,* in those cases a cease and desist order would provide all the relief an injunction would provide, if any relief in specie and in futuro were proper, *Far East Conference* being careful to add that if this turned out not to be the case an action would lie.

We need not spell out again that the mere existence of an industry regulatory statute and the mere possibility of conflict between the administrative agency set up to police it and the courts lend no support to the position of defendant-respondents or work a *pro tanto* repeal of the antitrust laws. "Regulated industries are not *per se* exempt from the Sherman Act." (*Georgia v. Penn. R. Co.,* 324 US 439, 456)

The cause should not have been dismissed. Whether proceedings should have been stayed in the beginning or not, there is now no occasion why it should not be sent back to go to trial in ordinary course.

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11. It further said that the holding in *Cunard* was that "the courts could not entertain the suit *until* the Board had considered the matter" (p. 496); not that an action never could be entertained.

II.

PETITIONER'S CLAIM AND WHAT THE COMMISSION DECIDED

Some things just said presuppose a knowledge of the decision of the Federal Maritime Commission of July 28, 1965, in Joint Agreement etc. (No. 8200), its Docket No. 872. So far as material its decision is set out in the Appendix to Petitioner's Brief p. 52ff.[11a] The parties can, of course, state their own position with respect to the effect of that decision and the Solicitor General and the FEC Brief, in effect, do so. We think a fair statement of their positions is that any administrative questions presented that were for determination by the Commission, before petitioner could proceed with its litigation, have been determined, and in such way that petitioner is entitled to pursue its litigation unless, of course, as argued by defendant-respondents, the antitrust statutes have been completely supplanted and no action based upon the antitrust statutes can be maintained against the common carrier by water in foreign commerce. PWC's Brief does not really take issue with this. It does, however, by calling attention to language of the Commission, endeavor (if we can update an old expression) to blow some smog into the air.[12] Accordingly, and for convenience, we briefly restate certain of the facts upon which petitioner relies and then excerpt the directly related language of the Commission.

The complaint identified the parties, spelled out the formation of PWC and FEC, averred the making of Agreement No. 8200 and pointed out its provision for independent action (Complt. par. 17, R. 18, 19,—the Agreement is set out in full at R. 45ff). It then averred that this Agreement notwithstanding, the defendants agreed to fix rates not as there provided and not as provided in their Conference agreements but that all the defendants should

11a. As proof of this Reply Brief is corrected and returned to the printer we are informed that the Commission has disposed of applications for reconsideration but have not seen the order.

12. See pp. 5, 8 but cf. 9, 10, 21.

fix rates for the members of PWC, that the rates so fixed should be given out as though fixed by PWC and that rates for members of PWC should not be changed "without the concurrence of defendant FEC, except a rate * * * in a list * * * known as a 'list of initiative items' in respect of which defendant PWC might establish rates without the concurrence of defendant FEC" (Complt. par. 18, R. 19, 20). The complaint was directed at the rates for an item *not* on the "initiative list" and it alleged that the "*list of initiative items did not include condensed and/or evaporated milk* until * * * May 1961" (Complt. par. 19, R. 20). What was charged, in this regard, was not that No. 8200 had been modified to eliminate its provision for independent action entirely or that this provision had been *generally* modified, but the charge was that there was an unfiled and unapproved side or supplementary agreement *calling for concurrence of both conferences in the change of rates which were not on the initiative list* and, that since evaporated milk was *not* on the initiative list, what was done in raising the rates on evaporated milk and refusing to lower them because FEC would not concur was a violation of the antitrust statutes to the damage of petitioner.

The Commission filed an answer which did *not* deny these averments. (R 36, 37) And with good reason.

This is what the Commission found:

The Commission was not concerned with antitrust violations. The Commission has no jurisdiction to enforce the antitrust statutes or to adjudicate antitrust violations as such. It was concerned with the Shipping Act and, more particularly, whether Agreement No. 8200 was in such form that, as filed with it, it could continue to be approved.

Upon a review of the evidence the Commission found, and we believe correctly, that Agreement No. 8200, as on file with the Commission, and as to the right of initiative action, had not been generally modified; that there had been no blanket surrender of the right of initiative action; that, accordingly, the agreement as

such was in form to be approved. There never has been a claim that PWC gave up *all* right of independent action. But petitioner did claim that by setting up the concurrence procedure for items *not* on the initiative list, *as to these items PWC did give up the right of independent action;* that the rates *which were in fact charged* for carriage of petitioner's evaporated milk were rates *not fixed by PWC acting independently* but were rates fixed under the unapproved provision for concurrence in the fixing of rates not on the initiative list. The Commission found that this was true.

Whether this is properly said to be not a modification of No. 8200 is largely beside the point. The point is that what Carnation was forced to pay was determined under an *unapproved* agreement to fix prices.

The Commission found specifically:

* * * * * * *

> The members of the respondent Conferences have met and adopted resolutions or have *collectively agreed to a common course of action* at meetings held at least annually since 1953, as evidenced by written minutes which were furnished to the Board and the Commission.

* * * * * * *

> I. *The supplementary agreements.*
>
> We now come to the first issue set out in the Order of Investigation, which is: Is Agreement No. 8200 a true and complete agreement between the parties? The Examiner held that the agreement was not a true and complete agreement between the parties, and that the conferences should file various "supplementary agreements"[1] with the Commission for approval before reapproval of Agreement No. 8200 is given by the Commission. The respondent conferences have excepted to this finding, * * * *We disagreed with respondents* as to both of their arguments, for the reasons hereinafter state.

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1. These supplementary agreements which deal with placement of items on the *initiative list,* overland rates and *concurrence procedure* are described more fully, *infra.*

* * * * * * *

We think that the holdings in the Commission decisions cited above clearly militate in favor of the position that the "supplementary agreements" were not within the purview of Agreement No. 8200 and were not routine, day-to-day arrangements which are exempt from the filing requirements of section 15. The *Associated Banning* case is particularly in point. It appears to us that Agreement No. 8200 is nothing more than evidence of a general intention of the parties to enter into concerted rate-making. It sets out no details, no procedures, with the exception of the procedures to be taken at the initial meeting, nor does it inform any interested person as to how the agreement is to work.

* * * * * * *

Thus, we hold that the supplementary agreements relating to *rate-making initiative,* overland rates, rate differentials and the *concurrence procedures* (encompassing all instances of the operation of the concurrence machinery except for the placement of items on the agenda of the initial meeting) *are without sanction in the basic Agreement No. 8200,* were therefore required by section 15 of the Shipping Act, 1916, to be filed with the Commission for approval, and, *not having been so filed, were and are being carried out in violation of the said section 15.*

* * * * * * *

(1) *The assignment of items to the initiative list is subject to concurrence,* * * *

(2) Rate changes on competitive items are subject to concurrence, * * *

(3) *Rate changes on initiative items are subject to concurrence where the conference requesting a particular change does not have the initiative* (i.e., such as the request for change in rate on evaporated milk when PWC did not have the initiative). This fact is borne out by the record developed in this case, and, more particularly, *by the facts pertaining to the charge of discrimination made by Carnation Company* (which will be discussed, *infra.*). These added instances of

the operation of the concurrence procedure appear to us to go far beyond an agreement to concur in matters voted on. Were we confined to the latter, we could agree with the Examiner that the basic agreement sanctions the concurrence procedure. However, the concurrence procedures touch other matters than the content of the agenda of the initial meeting. Respondents will therefore be required to *cease and desist from carrying out the concurrence procedures* until the same be filed with and approved by the Commission.

The initiative procedure provides a method whereby certain commodities are classified in two categories in such a way as to locate the power to change rates with or without agreement or concurrence. The conferences first agreed that the so-called "local initiative" rate-making authority would be established with respect to an agreed list of commodities if seventy percent of the total annual movement originated in either conference's local territory. Later, in 1956, the method of agreeing on the commodities to be listed was changed to require concurrence by the other conference before establishing "rate-making initiative on commodities, pursuant to the formula." An agreed list was then prepared.

The commodity *evaporated milk in 1953 was not classified and placed on the list of Pacific Westbound and remained off the list until 1961,* after this proceeding was instituted, even though in 1960-1961 ninety percent or more of the evaporated milk was moving from the West Coast to the Philippines. The record shows that *before 1961 Far East had refused to concur in such placement* in spite of the formula commitment the conferences made to each other regarding the seventy percent test.

A right to concur was established in May 1956, when it was agreed "authority to establish rate-making initiative on commodities pursuant to the formula defined in the preceding paragraph [the seventy percent formula] may only be granted . . . after concurrence by the other Conference."

Carnation, a shipper of evaporated milk, was affected before and after the right to concur was established. Before May 1956, evaporated milk remained off the initiative list of Pacific Westbound for no apparent reason, *and after May*

1956 because Far East would not concur. Apparently, no request should have been needed in either period to classify evaporated milk as an "initiative" commodity. Carnation's first record request for a rate change by Pacific Westbound was on November 11, 1957, after the addition of the concurrence procedure. *Carnation was unsuccessful because Far East would not concur, although at this time Carnation did not know why because the initiative list and concurrence procedure were still secret*[3] *as far as Carnation was concerned.* Carnation persisted in its efforts and *Pacific Westbound persisted in trying to obtain concurrence* (December 1957 through May 1958—13 exchanges between Far East and Pacific Westbound), but without success for three years, even though Far East was handling ten percent or less of the volume of evaporated milk shipped to the Philippines.

Both before and after the concurrence procedure was added, *Carnation and the public had every reason to believe that Pacific Westbound was making its own decisions* on rates based on the economics of shipment from the West Coast. It was developed in the record that *this was far from the case and not only was the concurrence procedure interfering with Pacific Westbound's initiative decisions,* but that Far East had conflicting interests in that it had to protect the movement of powdered milk from the East Coast. A shipper of powdered milk had demanded the same reduction as evaporated milk, so a change in the evaporated milk rate would affect the revenues of Far East members.

This conduct on the part of Far East and acquiescence therein by Pacific Westbound in the exercise of their respective powers shows that the seventy percent rule for giving the rate-making initiative, whether or not affected by the concurrence restriction, became a sham. The agreed-upon condition called for the exercise of independent action by Pacific Westbound, but it failed to act independently as it had a right to do under Article "SECOND" of Agreement No.

3. The minutes of the first meeting state that the "proceedings of minutes are confidential" and that "unauthorized disclosure to shippers of information regarding rate changes" and positions "regarding rate requests is contrary to the spirit of the Joint Agreement."

8200. Both Far East and Pacific Westbound, we hold, subjected Carnation, as a shipper; West Coast ports, as localities; and the commodity evaporated milk to unreasonable disadvantage in violation of section 16 of the Shipping Act, 1916. In our opinion the repondents' failure to abide by commitments when it suited the interests of the parties, without satisfactory reason, made the disadvantage "unreasonable."

The supplementary agreements which we have found to have been unfiled and to have been required to be filed consist of oral agreements reduced to memoranda, in the form of abstracts or summaries of minutes of meetings. If it has been assumed that these are now before the Commission for approval, the assumption is misplaced. They are only before us in the form of exhibits in this record and cannot be treated as filed agreements. Filing pursuant to the regulations of the Commission is an essential prerequisite to an adjudication as to approvability. * * * We therefore reverse the Examiner to the extent that he found that Agreement No. 8200 should be reapproved after the amendments are filed. Should the parties to Agreement No. 8200 decide to file these supplementary agreements, they would then be in a form suitable for action by the Commission pursuant to section 15.

For the sake of completeness it should be added: Petitioner claims only that the increase in rate was illegal *per se* because in pursuance of a price-fixing agreement unfiled and unapproved and, by consequence, not exempted from the antitrust statutes. Petitioner does *not* charge discrimination. It does not plant itself upon any claim of "unreasonableness" of rates, but only that they were *per se* illegal, whether reasonable or unreasonable.[13] It makes

13. PWC struggles to assert that we make a claim that would call for the exercise of administrative discretion or the use of special Commission expertise or on which different persons might differ. (See PWC Brief, p. 47.) It is not so. Nor do we charge a variety of wrongs as was the case in Cunard. (See PWC Brief, p. 13) FEC correctly states our position (FEC Brief, p. 46): "Petitioner's claim is not that the rates charged it were unreasonable. Its claim is that they were higher, by reason of the unlawful concerted action, than they otherwise would have been."

no claim for injunctive relief. Indeed, on petitioner's theory, so far as any claim for *injunctive* relief is concerned the matter is moot and past. Before petitioner's action was commenced on December 5, 1962, evaporated milk had been put on the PWC initiative list and on May 7, 1962, PWC, acting independently, had reduced the rates by the illegal increase of $2.50 per ton and to the rates which had applied before May 1, 1957 when they had been raised (Complt. par. 28, R. 24).

III.

KEOGH AND TERMINAL WAREHOUSE

Two decisions of this Court, to which some reference has been made by defendant-respondents, deserve comment, *Keogh v. Chicago & N.W. Ry.*, 260 US 156 and *Terminal Warehouse Co. v. Penn R. Co.*, 297 US 500.

Keogh was decided November 13, 1922. The opinion was written by Mr. Justice Brandeis. It is not likely that in writing in *Keogh* he overlooked or forgot what he had written less than 6 months before in *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 US 285. There is no suggestion of disagreement with anything in the earlier opinion. *Keogh* was a different sort of case. A shipper by rail sued eight railroad companies and others claiming that he had been charged by the carriers rates which were illegal under the antitrust statutes. Judgment was entered for defendants on overruling of a demurrer to a special plea. And no wonder. The plea set up that the rates had been duly filed with the Interstate Commerce Commission, that thereupon they had been suspended upon complaint of Keogh and that after extensive hearings, in which Keogh participated, the rates were approved by the Commission; and that the rates were not made effective until after they had been so approved. So, as the court states it, "The instrument by which Keogh is alleged to have been damaged are rates approved by the Commission. * * * All the

rates fixed were reasonable and nondiscriminatory. That was settled by the proceedings before the Commission." Accordingly, these rates were the legal rates and the only legal rates. The only rates which rail carriers can charge are those shown in their published tariff and they must charge those rates. Until they are set aside no other rates can be charged.[14] The Court pointed out:

> "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariffs. Unless and until suspended or set aside, this rate is made, *for all purposes,* the legal rate, as between carrier and shipper. *The rates, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier."*

This, of course, was enough to dispose of the case.[15] But the opinion went on with other comments, one of which is attempted to be availed of here. This was the remark that if shippers could sue under the antitrust statutes there might be discrimination because it was almost inconceivable that different juries would arrive at the same conclusions. This is what is sought to be seized upon here. But it can have no application in the case at bar because this is what the court was talking about in *Keogh*: If in *Keogh* an improper rate were charged, and if the plaintiff were entitled to make this claim, then the measure of his recovery would be the difference between the rate charged and a *reasonable* rate. Now different juries, on different, or even the same, evidence might very well find differently as to what a *reasonable* rate was. Some jury might find that the Commission approved rate was reasonable.

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14. This was by reason of express provision of the Interstate Commerce Act. At the time with which we are concerned there was no such provision in the Shipping Act, 1916, with respect to the rate to be charged by and paid to common carriers by water in foreign commerce. The Shipping Act, in this respect, was unlike the Interstate Commerce Act.

15. See the statement of the holding of *Keogh* in *Georgia v. Pennsylvania R. Co.,* 324 US 439, 453 as being: "The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier."

If the juries differed the bases for measuring recovery, if any, would likewise differ and there would not be uniformity in respect of the various suing shippers. Such a result is not possible in a case like that at bar because here the measure of illegality and damage, and the measure of recovery, is bound to be the same for every shipper, *the illegal $2.50 per ton exacted in excess of the legal rate. Keogh* **itself makes this precise point for us.**[16]

Terminal Warehouse presented a complicated situation. The case requires a more careful reading than we believe, with deference, has been given to it by counsel for defendant-respondents.

It is too long for detailed treatment here. It is enough to point out that it was one in which *only an Interstate Commerce Act violation was present;* that there was no actionable violation of the antitrust statutes; that "whatever liability was incurred through the forbidden discrimination was *under the Act to regulate commerce and not for treble damages*"[17] (p. 516); that "for the wrongs

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16. *Keogh,* at p. 165, pointed out that there "recovery cannot be had unless it is shown that * * * damages in some amount susceptible of expression in figures resulted. * * * To make proof of such facts would be impossible in the case before us. *It is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate. Southern Pacific Co. v. Darnel-Taenzar Co.,* 245 US 531."

17. In a very complicated legal and factual situation it had been determined that discriminatory privileges had been granted by rail carriers. But the Court pointed out (p. 511) that these "are unavailing without more to make out a combination in restraint of trade or commerce within the meaning of the Anti-trust Laws. To lead to that result the privileges or payments must be the symptoms or incidents of an enveloping conspiracy with its own illegal ends. *In the absence of such a showing* a sufferer from discriminatory charges and allowances has his remedy under the Commerce Act for any damage to his business, and that remedy is exclusive against all the parties to the wrong." The Court made it clear (p. 515) that it did not intimate "that never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages" and gave examples by making certain assumptions. But it then went on (p. 516): "None of these assumptions affects the case at hand. For reasons already stated there was no conspiracy to monopolize the storage business to the destruction of Terminal or of

it denounced" the Interstate Commerce Act provided a fitting and exclusive remedy. "If another remedy is sought under cover of *another* statute, there must be a showing of *another* wrong, *not* cancelled or redressed by the recovery of damages for the wrongs *explicitly denounced.*"

There was no violation of the antitrust statutes in *this* case, not because they were repealed or superseded, but because *no violation of the antitrust statutes was charged.*

When there is a violation of the antitrust statutes there *is* "a showing of another wrong" and when, as under Clayton Act § 4, treble damages is the "whole to which" the injured party is entitled and anything less will not be "full satisfaction of his claim" then the wrong is not "cancelled or redressed by the recovery of" single damages or something less. (See Petitioner's Brief, p. 32)

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others similarly situated. There was no conspiracy to impose upon that business a burden of any kind, except to the extent that the enjoyment of a preference might increase the opportunities for a profit for the warehouse so preferred. Of any combination more far-reaching, more inclusive in its aims, there is silence in the record after every reasonable inference has been drawn from its pages. On the contrary, the history of the relation between Pennsylvania and Merchants indicates strongly that the illegal discrimination, far from being a symptom of a larger combination, was the product of a mistake of law." And "a preference innocent in purpose should not be magnified into a token of a circumambient conspiracy." In immediate sequence the court used the language quoted above in the text that whatever liability there was, *was under the Act to regulate commerce and not for treble damages.*

Slick Airways v. American Airlines, 107 F Supp (D.N.J.), app. dis. and writ den. 204 F2d 230 (Cir. 3), writ den. 346 US 806, reviewed *Terminal Warehouse* and said that the Court there held "that the gist of the complaint was merely discrimination in rates and the allowance of forbidden preferences, wrongs for which the Interstate Commerce Act provided a 'fitting' and 'exclusive' remedy" and where it appeared, at the trial, that plaintiff's "only damages were those resulting from the discriminatory acts and not from any conspiracy transcending those particulars. It was unable to show a conspiracy to establish a monopoly."

IV.

NEITHER THE GENERAL SCHEME OF THE SHIPPING ACT NOR THE SANCTIONS IT PROVIDES WORK A GENERAL EXEMPTION FROM THE ANTITRUST STATUTES OF WATER CARRIAGE IN FOREIGN COMMERCE

It will serve no purpose to take up here, one by one, the detail of, or to point out and correct, inaccuracies and incautious statements.[18] The necessary materials were supplied in anticipation in Petitioner's Brief. But the attempt, in the face of the deliberate and limiting provision for exemption from the antitrust statutes of Shipping Act § 15, to argue (a) a generalized exemption of all industry activities from the antitrust statutes because of the scheme of Shipping Act, 1916, and (b) a general and complete substitution of Shipping Act, 1916, sanctions for those of the antitrust statutes,—the sort of thing rejected in *Panagra,* 371 US 296, 304 (Petitioner's Brief, p. 91),—deserves short comment.

There is an attempt to argue a general exemption of water carriage in foreign commerce from Sherman Act § 1,—an industry exemption that exists for no other industry. The position taken is "that the complete program of the Shipping Act, 1916, for the substantive (§ 15) and remedial (§ 22) regulation of ocean carrier agreements superseded, *pro tanto,* the antitrust laws" (FEC Brief, pp. 1, 2). It is said: "Section 15, we submit, is a completely pervasive, substantive law regarding ocean carrier agreements" (FEC Brief, p. 43) and from this complete substitution for the antitrust laws is argued. At other places, however, the statement is made, which more closely approaches being accurate, that "Congress substituted a program of *regulated* agreements, in the case of ocean carriers, for the outright prohibitions of the antitrust laws, *with the regulation to be done by the Commission*" (FEC Brief, p. 6).

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18. As an example it is said (PWC Brief, p. 46) that carriers are prohibited by the Shipping Act from providing transportation at less than the regular rates. The actual provision, as to carriers in foreign commerce, was that of § 16 Second that it is unlawful for them to allow obtaining transportation "at less than the regular rates" etc. *"by means of false billing, false classification"* etc. *"or any other unjust or unfair device or means."*

The main theme of the Shipping Act, 1916, program is in § 15. It is a program for industry regulation by agreement. But the program is very far from one of freedom of agreement. The program is one of regulation only by agreements *which have received Commission approval.* This is clear from the language of the statute. The legislative history reinforces the proposition that the essential part of the program of Shipping Act, 1916, was not the making of agreements by those subject to the Act but *the exercise of Government control over the industry by control of those agreements.* The Committee report (H.R. Doc. 805, 63d Cong., 2d Sess., 416ff) is unambiguous. The advantages sought by the legislation, it is said,

> "can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling agreement *under Government supervision and control.*"

And it was further said

> "that the disadvantages and abuses connected with steamship agreements and conferences as now conducted, are inherent, and can only be eliminated by *effective Government control;* and it is *such control* that the Committee recommends as a means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of."

The plan of Congress was one of "Government supervision and control" and "effective Government control". The statute provided for this by permitting the making and carrying out of agreements *but only when approved by the Commission.* For this plan of Congress defendant-respondents, at least so far as private suitors and the anti-trust statutes are concerned, ask that the Court substitute a scheme of agreement *only.* They would give the same practical effect of elimination of the Sherman and Clayton Acts to unfiled agreements,—and complete *absence* of "Government supervision and control",—as to Government control and approval.

We submit, with deference to counsel upon the other side, that if the argument does not answer itself, § 15 answers with its provision for exemption *on approval.*

Turning from its scheme as a whole to the remedies provided by Shipping Act, 1916, defendant-respondents argue that the Act would not have provided a remedy by way of reparations if it were thought that the Clayton Act § 4 remedy of treble damages was available because, it is said in effect, Congress could not have been so stupid as to have supposed that anyone would use the Shipping Act remedy of application for reparation under § 22 if treble damages could be recovered under Clayton Act § 4. The answer is simple and complete. Shipping Act, 1916, provided for reparations for damage resulting from violation of *its* provisions because there are many wrongs under *that* Act causing damage *which are not violations of the antitrust statutes.* (Cf. *Terminal Warehouse,* above.) The argument was anticipated. We respectfully call attention to p. 39 of Petitioner's Brief.

Finally it is suggested that to permit a suit for treble damages under Clayton Act § 4 would be disruptive of the scheme of Shipping Act, 1916. But there is only one real difference between treble damages under Clayton Act § 4 and reparations under Shipping Act, 1916, assuming that both remedies are made available by the same conduct. The *only* real difference is that under Clayton Act § 4 the defendant pays three times what he would pay in reparations under the Shipping Act. This is the *only* real difference. This has no effect on the operation of the Shipping Act, although treble damages have an unpleasant effect on the amerced defendant. The failure to appreciate this want of difference in the effect of the remedies is due to a failure to appreciate the scheme of the Shipping Act civil remedy by way of a money award.

Awarding of reparations by the Commission under Shipping Act, 1916, § 22, by an order for the payment of money, *is only a prologue.* This award cannot be enforced. The order is only an opening for a § 30 plenary action at law, not *on* the award but

on the original claim. This calls for a full scale trial in the District Court, jury included. (See Petitioner's Brief p. 38 and note 37 and especially the quotation from *United States v. I.C.C.*, 337 US 426, 445.) The result would not be different from that in a Clayton Act § 4 action except that in the latter, upon return of a jury's verdict for the plaintiff, the amount is trebled. It can not be seriously urged that a Clayton Act § 4 action would be any more disruptive of the scheme and operation of Shipping Act, 1916, than this Shipping Act § 30 action. The only differences are the *prima facie* value of an award under § 22 in the § 30 action, a matter of no significance if the court differs from the Commission on a controlling point of law, and which in some Clayton Act § 4 actions might be compensated for by *prima facie* evidence under Clayton Action § 5(a) (15 USC § 16(a)), and the trebling of the award in the Clayton Act proceeding. If there are other differences we have yet to see them pointed out.

A District Court judgment for Clayton Act damages for past conduct would no more interfere with the Commission's dealing, in the future, with the matter in question, or any other matter, than would a District Court judgment in a Shipping Act § 30 action.

CONCLUSION

It is respectfully submitted that the judgment should be reversed and the cause dealt with as prayed in Petitioner's Brief.

San Francisco, California, November 3, 1965.

Arthur B. Dunne
James R. Baird, Jr.
Attorneys for Petitioner
Carnation Company

CERTIFICATE OF SERVICE

I, Arthur B. Dunne, certify as follows:

I am a member of the Bar of the Supreme Court of the United States. I represent Carnation Company, Petitioner in the above entitled matter, in whose behalf service of the foregoing brief has been effected as herein stated.

I certify that on or before November 3, 1965, I served the foregoing Brief on behalf of Petitioner upon the respondents and the Solicitor General of the United States by service of three (3) copies upon the Solicitor General of the United States and three (3) copies on each of the respective attorneys for respondents whose appearances have been entered herein by mailing the same at San Francisco, California, postage prepaid, first class mail to the addresses in San Francisco, California, and airmail to the other addresses, as follows:

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 20

CARNATION COMPANY, PETITIONER

v.

PACIFIC WESTBOUND CONFERENCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM SUBMITTING OPINION OF THE FEDERAL MARITIME COMMISSION ON PETITIONS FOR REHEARING AND CLARIFICATION IN DOCKET NO. 872

On November 1, 1965, the Federal Maritime Commission issued the accompanying opinion denying petitions for rehearing and clarification in its Docket No. 872. Since the parties have referred to the Commission's main opinion in that proceeding and the petitioner has reprinted pertinent portions thereof in the Appendix to its brief (pp. 52–66), we think it appropriate to bring this supplemental opinion to the Court's attention.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1965.

792-693—65

SERVED
NOVEMBER 1, 1965
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

No. 872

JOINT AGREEMENT BETWEEN MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

ON PETITIONS FOR REOPENING AND CLARIFICATION

Carnation Company and Far East Conference, oth parties in this proceeding, have filed Petitions or Clarification of our Report and Order served in his Docket on July 28, 1965. Pacific Westbound Conference and Far East Conference have filed re-lies to Carnation's Petition; no replies have been led to Far East's Petition.

(a) *Carnation's Petition:* Carnation requests the Commission to modify the Report of July 28, 1965, by a clear finding that PWC did in fact by the peration of the agreements found to be carried out n violation of Section 15 give up its right of inde-endent action." Carnation's request discloses a ailure to note the main thrust of our opinion on his point. Briefly, we found that the right of inde-endent action was preserved by Agreement 8200 in

express terms and that the language of the agreement was never formally modified. In rejecting Carnation's position that a secret agreement existed by which PWC had given up the right of independent action we stated that "we are unable to find any evidence of a secret agreement * * *." *Report*, p. 11.

Carnation has now apparently shifted its position somewhat, so that rather than arguing that a secret agreement was made or does exist, it argues that from the respondents' course of conduct the Commission can draw no inference other than that a secret agreement did exist. In our Report, we stated:

> In our view, Pacific Westbound violated section 16 of the Shipping Act, 1916, by not taking independent action when it clearly had the right so to do. *This is not to say that the right had been surrendered, or that the circumstances of this case warrant a disapproval of Agreement No. 8200 under section 15 of the Shipping Act. Report,* p. 13. [Emphasis supplied.]

It is this distinction which Carnation has failed to grasp. There is a difference between a course of conduct which warrants the inference that the right has in fact been surrendered and a course of conduct which results in a violation of section 16, but is not so overwhelming as to enable the Commission to conclude that the right has been surrendered.

(b) *Far East Petition:* Far East Conference has asked for a clarification of our Report in order to delineate just what joint action PWC and FEC may take under Agreement No. 8200, pending the filing and approval of the so-called "supplementary agreements." Far East asks that we make clear that the two conferences are allowed to take "joint action

with respect to the rates * * * of either or both of them at joint meetings or by means of postal, telegraphic, or telex communication * * *." *Petition*, p. 5.

In our opinion, Agreement No. 8200 does not sanction such joint action. We thought it clear from our Report that we found Agreement No. 8200 to be

> nothing more than evidence of a general intention of the parties to enter into concerted ratemaking. It sets out no details, no procedures, with the exception of the procedures to be taken at the initial meeting, nor does it inform any interested persons as to how the agreement is to work. *Report*, p. 6.

We have again carefully restudied Agreement No. 8200, and our conclusion is re-affirmed. Agreement No. 8200 provided for an "initial meeting," at which time procedures were to be adopted for "the change of any rates, rules or regulations * * *." The Agreement itself does not set out these procedures, and thus it is not authority for joint rate action.

In our discussion of the concurrence procedures, we emphasized that the only provision in Agreement No. 8200 for concurrence (joint action) was for the placement of items on the agenda of the initial meeting. All other instances of the operation of the concurrence machinery, i.e., the assignment of items to the initiative list, rate changes on competitive items, and rate changes on initiative items, were "added" instances and thus constituted an unapproved supplementary agreement. Under our reasoning, affirmed here, there exists no *approved* agreement which permits joint rate action between PWC and FEC.

Nor is this position inconsistent with our finding that Agreement No. 8200 preserved the right of inde-

pendent action to each conference. A close reading of the independent action clause reveals that it allows each conference to notify the other of rate changes before such changes are to be effective. The clause by itself is not meaningless; such an arrangement between competitors would necessarily be an agreement subject to section 15 of the Shipping Act. However, the fact that it was included in Agreement No. 8200 does not mean that the Agreement sanctions joint rate action.

The petitions are denied.

By the Commission.[1]

(Signed) Thomas Lisi,

[SEAL] (Typed) THOMAS LISI,

Secretary.

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[1] Commissioner Hearn did not participate.

U.S. GOVERNMENT PRINTING OFFICE: 1965

criminal action by ... [illegible] of the indictment ... [illegible] both conditions ... [illegible] before such ... [illegible] [illegible]

By the Commission.

[SEAL] [illegible]

SUPREME COURT OF THE UNITED STATES

No. 20.—October Term, 1965.

Carnation Company, Petitioner, v. Pacific Westbound Conference et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February 28, 1966.]

Mr. Chief Justice Warren delivered the opinion of the Court.

We granted certiorari in this case in order to determine whether the Shipping Act of 1916, 39 Stat. 733, as amended, 75 Stat. 763, 46 U. S. C. §§ 801–842, precludes the application of the antitrust laws to the shipping industry.

The petitioner in this case is a shipper in foreign commerce that ships substantial quantities of evaporated milk from the West Coast of the United States to the Philippine Islands. The respondent conferences are associations of shipping companies that establish rates for their respective members pursuant to agreements approved by the Federal Maritime Commission. Pacific Westbound Conference is composed of companies operating between the West Coast and the Far East; Far East Conference of companies operating between the Atlantic and Gulf Coasts and the Far East.

In 1957, Pacific Westbound announced a rate increase of $2.50 per ton for the shipment of evaporated milk to the Philippine Islands. Petitioner attempted to persuade Pacific Westbound to restore the original rate, but Pacific Westbound declined to do so until 1962.

Petitioner filed an antitrust treble damage action against the respondent conferences and their respective members shortly after the original rate was restored.

Petitioner alleged that Pacific Westbound initiated and maintained the rate increase in order to implement certain rate-making agreements between the conferences which have never been approved by the Maritime Commission. Petitioner also alleges that it asked Pacific Westbound to restore the original rate and that Pacific Westbound only refused to do so because Far East would not agree to it. Petitioner claimed that it is entitled to recover treble damages because the implementation of such unapproved agreements is unlawful *per se* under the antitrust laws.

Respondents moved to dismiss, claiming that the Shipping Act of 1916 repealed all antitrust regulation of the rate-making activities of the shipping industry. The District Court granted the motion. The Court of Appeals for the Ninth Circuit affirmed the dismissal of the action on the grounds that such an action cannot be maintained until the Commission has passed upon the agreements, 336 F. 2d 650. We granted certiorari, 380 U. S. 905, and hold that the implementation of rate-making agreements which have not been approved by the Federal Maritime Commission is subject to the antitrust laws.

The Shipping Act contains an explicit provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This express provision covers approved agreements, which are lawful under § 15, but does not apply to the implementation of unapproved agreements, which is specifically prohibited by § 15.[1] The creation of an antitrust exemption for

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[1] Section 15 (46 U. S. C. § 814) provides in part:

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement,

rate-making activities which are lawful under the Shipping Act implies that unlawful rate-making activities are not exempt. This Court so interpreted an analogous provision of the Agricultural Marketing Agreement Act, 50 Stat. 246, 7 U. S. C. § 601 *et seq.*, exempting marketing agreements approved by the Secretary of Agriculture from the antitrust laws. The Court there declared that the "explicit provisions requiring official participation and authorization show beyond question how far Congress intended the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant further immunity, Congress doubtless would have said so." *United States* v. *Borden Co.*, 308 U. S. 188, 201.

Respondents contend, nevertheless, that the § 15 exemption does not reflect the true intent of the Congress which enacted it. They insist that the structure of the Act and its legislative history demonstrate an unstated legislative purpose to free the shipping industry from the antitrust laws.

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modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by Section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of Section 817 (b) of this title and with the provisions of any regulations the Commission may adopt.

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action . . . ."

We do not believe that the remaining provisions of the Shipping Act can reasonably be construed as an implied repeal of all antitrust regulation of the shipping industry's rate-making activities. We recently said: "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 350–351. We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts. See, *e. g., United States* v. *Philadelphia National Bank,* 374 U. S. 321.

The historical background of the Shipping Act does not indicate that a different rule of construction should be applied in interpreting that Act. The Congress which enacted the Shipping Act was not hostile to antitrust regulation. On the contrary, the Shipping Act was the end product of an extensive investigation of the shipping industry that was conducted by the Congress which enacted the Clayton Act.[2]

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[2] The Shipping Act of 1916 was passed following an exhaustive investigation into shipping combinations undertaken by the House Committee on Merchant Marine and Fisheries under the chairmanship of Congressman Alexander. That Committee issued its Report on Steamship Agreements and Affiliations in the Domestic Trade, H. R. Doc. No. 805, 63d Cong., 2d Sess. ("Alexander Report") in 1914.

Respondents claim, nonetheless, that the Committee which conducted the investigation must have been hostile to antitrust regulation of the shipping industry because it concluded that the abolition of the conference system, which the Sherman Act probably required, would not be in the public interest. But the Committee also concluded that the conference system had produced substantial evils and that it should not be permitted to continue without governmental supervision.

The Committee said: "While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the Committee show that they must be recognized." H. R. Doc. No. 805, 63d Cong., 2d Sess., pp. 417–418.

Therefore, it seems likely that the Committee really only wanted to give the shipping industry a limited antitrust exemption. We do not believe that their purpose would be frustrated by the application of the antitrust laws to the implementation of conference agreements which have not been subjected to public scrutiny and examination by a governmental agency.[3]

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[3] Respondents contend that treble damage actions will frustrate one of the Committee's purposes. The Committee found, however, that the conferences had discriminated among shippers and concluded that such discrimination should be eliminated. Respondents assert that treble damage awards for shippers are equivalent to rebates and that shippers will receive unequal "rebates" because different courts and juries will inevitably apply different measures of damages. Therefore, they conclude that treble damage actions will frustrate the Shipping Act policy of equality of treatment for shippers.

We believe that Congress was concerned with assuring equality of treatment by the conferences, not with equality of treatment by

But even if the Committee considered the possibility of a complete antitrust exemption at the time of the 1914 Report, the § 15 exemption clearly demonstrates that those who drafted the Shipping Act during the next Congress decided not to give the industry complete antitrust immunity. Since the problem of the application of the antitrust laws to the shipping industry was one of the focal points of the entire inquiry, the exemption provision could not have been a casual afterthought. The language of that provision must have been selected as a matter of deliberate choice in order to indicate the extent to which the industry's rate-making activities remain subject to the antitrust laws as well as the extent to which those activities are exempted from antitrust regulation.

This Court's decisions in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570, do not conflict with our interpretation of the Shipping Act. Those cases merely hold that courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Shipping Act in order to avoid the possibility of conflict between the courts and the Commission.

The plaintiffs in the *Cunard* and *Far East* cases were seeking to enjoin activities which allegedly implemented unapproved agreements even though the Commission had never determined whether those alleged activities constituted the implementation of unapproved agreements. There was a real risk that the District Court might find that the defendants had implemented unapproved agreements while the Commission might find in some later proceeding that the same activities consti-

juries in collateral proceedings. There is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others.

tuted the implementation of approved agreements. This Court decided that the danger of such a conflict could best be avoided by holding that one tribunal or the other has the exclusive right to make the initial factual determination. Since the Commission has specialized knowledge of the industry, the Court concluded that such primary jurisdiction should be vested in the Commission and accordingly instructed the District Court to refrain from acting until the Commission had ascertained and interpreted the circumstances underlying the legal issues.

The relief requested in the *Cunard* and *Far East* cases also created another source of possible conflict. Even if the Commission found that the defendants in those cases had implemented unapproved agreements, the Commission might decide to approve the prospective implementation of those agreements. The Commission would obviously be hampered in the exercise of that power if a court had previously issued an unconditional injunction prohibiting the implementation of the agreements in question. Therefore, the Court concluded that the District Court should not be permitted to issue an unconditional injunction in the absence of a Commission determination disapproving future operations under those agreements.

The considerations which led to our decisions in the *Far East* and *Cunard* cases do not require that the shipping industry be totally immunized from antitrust regulation. The *Far East* and *Cunard* principles permit courts to subject activities which are clearly unlawful under the Shipping Act to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers. The *Far East* opinion explicitly recognized that this is the case. The Court observed that the Government could reinstate its injunction suit if and when the Commission found that the defendants' activities were not

lawful under the Shipping Act and would not be approved prospectively.[4]

The award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission. Although the Commission can approve prospective operations under agreements which have been implemented without approval, respondents concede that the Commission has no power to validate preapproval implementation of such agreements. Therefore, the *Far East* and *Cunard* principles only preclude courts from awarding treble damages when the defendants' conduct is arguably lawful under the Shipping Act.

The Court of Appeals thought that respondents' activities were arguably lawful under the Shipping Act. It concluded that respondents' activities conceivably constituted the implementation of a 1952 agreement between the respondents which had been approved by the Commission. Therefore, the Court of Appeals affirmed the District Court's order dismissing the action.

Even if the respondents' alleged activities appeared to be arguably protected by the Shipping Act at the time

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[4] The Court said:

"Having concluded that initial submission to the Federal Maritime Board is required, we may either order the case retained on the District Court docket pending the Board's action . . . or order dismissal of the proceeding brought in the District Court . . . . We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily reinstituted later, if appropriate." 342 U. S. 570, 576–577.

If the *Far East* decision had held that the activities in question could never be subjected to the antitrust laws under any circumstances, there would obviously have been no reason to consider whether the proceedings should be stayed or dismissed. Thus, the *Far East* opinion effectively determined that the implementation of unapproved rate-making agreements is subject to antitrust regulation.

of the Court of Appeals' decision, we believe that the Court of Appeals erred in dismissing the action. The Court of Appeals apparently thought that this was the proper course because this Court dismissed the action in *Far East*. However, the *Far East* opinion indicates that the Court only chose to dismiss that action rather than to stay the proceedings pending Commission action because it found that dismissal would not prejudice the plaintiff's right to obtain antitrust relief at the appropriate time.[5] That plaintiff was seeking injunctive relief from continuing conduct. Such a suit could easily be reinstituted if and when the Commission determined that the activities in question violated the Shipping Act. But a treble damage action for past conduct cannot be easily reinstituted at a later time. Such claims are subject to the Statute of Limitations and are likely to be barred by the time the Commission acts. Therefore, we believe that the Court of Appeals should have stayed the action instead of dismissing it.

In any event, this particular procedural problem has become moot. The Commission completed its own investigation of respondents' activities after certiorari was granted and concluded that its approval of respondents' 1952 agreement did not cover the implementation of the subsequent agreements which are the basis of petitioner's treble damage complaint.[6] Respondents have not sought

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[5] See note 4, *supra*.

[6] The Federal Maritime Commission commenced an investigation in 1959 to determine whether the 1952 agreement between respondents constituted the full agreement between the parties. This investigation culminated in the issuance of the Commission's *Report on Joint Agreement Between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference*, Federal Maritime Commission Docket No. 872, July 28, 1965, rehearing denied, November 1, 1965.

The Commission found that the respondents had entered into and implemented a number of joint rate-making agreements after the

appellate review of the Commission's order and cannot now do so because the time for appeal has expired. Thus, there can no longer be any doubt that respondents' activities violated the Shipping Act and are not arguably exempt from antitrust regulation.

Petitioner's treble damage action is based upon the theory that those same subsequent rate-making agreements are unlawful *per se* under the antitrust laws.

Petitioner participated in the proceedings before the Commission, but petitioner did not ask for reparations under the Shipping Act and, therefore, could not be accorded any. Petitioner's failure to seek Shipping Act reparations does not affect its rights under the antitrust laws. The rights which petitioner claims under the antitrust laws are entirely collateral to those which petitioner might have sought under the Shipping Act. This does not suggest that petitioner might have sought recovery under both, but petitioner did have its choice.

Therefore, we reverse the order dismissing this action and remand the case to the United States District Court for the Northern District of California for a determination of the antitrust issues.

It is so ordered.

Commission approved the 1952 agreement for consultation and that none of the subsequent agreements had been filed for approval. The Commission concluded that its approval of the 1952 agreement did not cover any of the subsequent agreements and, therefore, that respondents had violated the Shipping Act by implementing those subsequent agreements.

ORDER LIST

MONDAY, MARCH 7, 1966

ORDERS IN PENDING CASES

No. 20 CARNATION COMPANY V. PACIFIC WESTBOUND CONFERENCE ET AL.

It is ordered that the opinion of the Court in this case handed down on February 28, 1966, is amended as follows:

(1) By striking that portion of the last paragraph on page eight of the slip opinion commencing with the words "Even if" and concluding with the words "Court of Appeals' decision" in the first line of page nine;

(2) By striking the first, third, and fourth sentences of the paragraph commencing on page nine and concluding on page ten, and adding the following "An appeal from the Commission's decision is now pending." after the sentence commencing "The Commission completed" in said paragraph;

(3) By striking the words "for a determination of the antitrust issues." from the last paragraph of the opinion and substituting therefor the words "with instructions to stay the action pending the final outcome of the Shipping Act proceedings and then to proceed in a manner consistent with this opinion."